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No. 08-___

IN THE

Supreme Court of the United States

HK SYSTEMS, INC.,
Petitioner,

v.

EATON CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a district court sua sponte overturn a jury verdict and grant judgment as a matter of law by raising a new issue that a party waived by never raising at trial.

2. After a jury verdict, may a district court give no weight to the trial evidence when it makes findings of fact to grant judgment as a matter of law and overturn a jury verdict.

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the Seventh Circuit of Appeals.

The petitioner here and appellant below is HK Systems, Inc.

The respondent here and appellee below is Eaton Corporation.

RULE 29.6 STATEMENT

HK Systems, Inc. has no corporate parents and no publicly held company owns 10% or more of HK Systems, Inc.'s stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND PROCEDURAL PROVISIONS INVOLVED	2
A. Rule 50's procedural structure for moving for judgment as a matter of law	5
B. The proceedings before the district court	8
1. Background and jury verdict	8
2. The district court vacates the jury verdict	11
C. The Seventh Circuit affirmed	13
REASONS FOR GRANTING THE PETITION	15
I. This Case Squarely Presents The Conflict On Whether A District Court Can Raise A New Issue After Trial To Overturn A Jury Verdict On That New Basis	17
II. The Lower Court's Decision Also Conflicts With A Decision Of This Court On An Important And Recurring Seventh Amendment Issue	22
III. The Lower Courts' Decisions Are Incorrect	26

TABLE OF CONTENTS—Continued

Page

CONCLUSION 30

APPENDIX

APPENDIX A: OPINION FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 1a

APPENDIX B: DECISION AND ORDER VACATING JURY VERDICT FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN 12a

APPENDIX C: DECISION AND ORDER TO ENTER JUDGMENT FOR EATON CORP. FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN 40a

APPENDIX D: DECISION AND ORDER GRANTING RECONSIDERATION OF ENTRY OF PARTIAL SUMMARY JUDGMENT ON LIABILITY ISSUES FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN 48a

APPENDIX E: EXCERPT OF MARCH 18, 2009 DECISION AND ORDER DENYING EATON CORP.'S MOTION FOR SANCTIONS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN... ..... 62a

TABLE OF CONTENTS—Continued

Page

APPENDIX F: ORDER DENYING PLAN REHEARING AND PETITION FOR REHEARING EN BANC FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 64a

APPENDIX G: FINAL JUDGMENT FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN 65a

APPENDIX H: JURY VERDICT FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN 66a

APPENDIX I: EXCERPT FROM EATON'S APPEAL BRIEF 68a

TABLE OF AUTHORITIES

FEDERAL CASES Page

American and Foreign Ins. Co. v. Bolt,
106 F.3d 155 (6th Cir. 1997) 8, 18, 19

Anderson v. Fuller,
455 U.S. 1028 (1982) 26

Avitia v. Metropolitan Club of Chicago, Inc.,
49 F.3d 1219 (7th Cir. 1995) 20, 21

Berry v. U.S.,
312 U.S. 450 (1941) 25

Bill Jonson's Restaurants, Inc. v. NLRB,
461 U.S. 731 (1983) 6

Chemetall GMBH v. ZR Energy, Inc.,
320 F.3d 714 (7th Cir. 2003) 20

Doe v. Celebrity Cruises, Inc.,
394 F.3d 891 (11th Cir. 2004) 7, 18

Helmbrecht v. St. Paul Ins. Co.,
362 N.W.2d 118 (Wis. 1985)..... 25

Kutner Buick, Inc. v. American Motors Corp.,
868 F.2d 614 (3d Cir. 1989)..... 8, 19

Morante v. American General Financial Ctr.,
157 F.3d 1006 (5th Cir. 1998) 7

Mozingo v. Correct Mfg. Corp.,
752 F.2d 168 (5th Cir. 1985) 8, 20

Murphy v. City of Long Beach,
914 F.2d 183 (9th Cir. 1990) 8, 19

O'Donnell v. Elgin, J. & E. Ry. Co.,
338 U.S. 384 (1949) 25

TABLE OF AUTHORITIES—Continued

Page

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) ..... *passim*

Tennant v. Peoria & P. U. Ry. Co., 321 U.S. 29 (1944) 25

Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394 (2006) 6, 7, 17

Weisgram v. Marley Co., 528 U.S. 440 (2000) 6

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VII ..... *passim*

FEDERAL STATUTES

28 U.S.C. § 1254(1) 2

FEDERAL RULES

Fed. R. Civ. P. 50 ..... *passim*
Fed. R. Civ. P. 50, Advisory Committee Notes of 1991 Amendment 6, 7, 17, 19
Fed. R. Civ. P. 54(b) 12, 22
Fed. R. Civ. P. 56 ..... 5, 23

TREATISES

9B C. Wright & A. Miller, Federal Practice and Procedure (3d ed. 2008) 6, 7
9A C. Wright & A. Miller, Federal Practice and Procedure (2d ed. 1995) 6

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PETITION FOR A WRIT OF CERTIORARI

Petitioner HK Systems, Inc., respectfully requests that this Court grant the petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the court of appeals (Appendix ("App.") 1a-11a) is published at 553 F.3d 1086 (7th Cir. 2008). The order of that court denying the Petition for Panel Rehearing and Rehearing en Banc (App. 64a) was entered on March 3, 2009, and is unreported. The opinions of the United States District Court for the Eastern District of Wisconsin

vacating the jury verdict (App. 12a-39a) and granting judgment to Eaton (App. 40a-47a) are also unreported.

JURISDICTION

The court of appeals entered its decision on January 28, 2009, and denied the timely petition for rehearing on March 3, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND PROCEDURAL PROVISIONS INVOLVED

The Seventh Amendment to the U.S. Constitution provides in relevant part that "no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

Rule 50 of the Federal Rules of Civil Procedure provides in relevant part:

> (a) Judgment as a Matter of Law.
>
> (1) In General.
>
> If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
>
> (A) resolve the issue against the party; and
>
> (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) Motion.

A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial.

If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged — the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

STATEMENT OF THE CASE

The relevant facts involve a conflict between the circuits on whether a district court may grant judgment as a matter of law and overturn a jury verdict by raising a new issue the losing party had waived by

never raising in its pre- or post-verdict motions. Petitioner HK Systems, Inc. ("HK") filed suit against respondent Eaton Corporation ("Eaton") for breach of an indemnification agreement, and the case was tried to a jury. The jury returned a verdict for HK and awarded damages. Nine months later, the district court surprised HK with a new causation theory that Eaton had never raised in its pre- or post-verdict motions under Fed. R. Civ. P. 50. In fact, Eaton never raised this new theory during the years of motion practice preceding the jury verdict. Nevertheless, based on its new theory, the district court held that no reasonable jury could find for HK, overturned the jury verdict, and granted judgment for Eaton. The district court did this under the guise of "reconsidering" its earlier pre-trial denial of Eaton's summary judgment motion – a motion the district court earlier denied because it concluded a trial was necessary to resolve disputed facts – and, as the Seventh Circuit observed, the trial evidence "did not bear on the judge's decision" when he granted judgment as a matter of law to Eaton. (App. 5a.)

If this had occurred in the Third, Fifth, Sixth, Ninth, or Eleventh Circuits, the district court would have been reversed, for those circuits have expressly held that district courts lack any authority to overturn jury verdicts by raising new theories a party waived by never raising in its pre-verdict Rule 50 motions. No authority allows a district court to disregard the trial and trial evidence and grant judgment as a matter of law based on a disputed pre-trial summary judgment record. Indeed, this Court has expressly held that a court must review "all" of the trial evidence of record and draw all reasonable inferences in favor of the nonmoving party when granting judgment as a matter of law after trial.

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150-51 (2000).

The Seventh Circuit, however, affirmed. It acknowledged that Eaton waived the issue by never raising it in its pre-verdict motions. (App. 3a–4a.) Yet, in stark contrast to the Third, Fifth, Sixth, Ninth, and Eleventh Circuits, the Seventh Circuit held that a district court has the discretion to "exercise mercy" and sua sponte raise a new issue after trial to overturn a jury verdict. (App. 4a.) The Seventh Circuit further held that because the district court's new theory was purportedly a "pure issue of law," the lower court was free to revisit the causation issue without considering the trial evidence because the trial was "an irrelevance" and, therefore, the district court "was not depriving HK of the benefit of any of the evidence presented at the trial." (App. 5a.) By raising new issues and treating the trial evidence as an irrelevance to grant judgment as a matter of law that no reasonable jury could find for HK, however, the district court usurped the jury's role to weigh evidence and find facts. The Seventh Circuit's affirmance directly conflicts with decisions by this Court and other Circuits on important and recurring issues that raise serious Seventh Amendment concerns. Only this Court can resolve these conflicts.

A. Rule 50's procedural structure for moving for judgment as a matter of law.

There was a jury trial and verdict. Federal Rule of Civil Procedure 50 sets forth the requirements for moving for judgment as a matter of law in civil jury trials. The primary difference between Rule 50 motions for judgment as a matter of law and Rule 56 motions for summary judgment "is procedural": summary judgment motions are made before trial and are

"decided on documentary evidence," while motions for judgment as a matter of law are made at trial and are "decided on the evidence that has been admitted." *Bill Jonson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745 n.11 (1983). Rule 50 "allows the trial court to remove cases or issues from the jury's consideration 'when the facts are sufficiently clear that the law requires a particular result.'" *Weisgram v. Marley Co.*, 528 U.S. 440, 448 (2000) (quoting 9A C. Wright & A. Miller, Federal Practice and Procedure § 2521, p. 240 (2d ed. 1995). Rule 50 establishes two stages for challenging the sufficiency of the evidence – prior to submission of the case to the jury, and after the verdict and entry of judgment. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 399 (2006).

Rule 50(a)(2) states that a party may move for judgment as a matter of law "at any time before the case is submitted to the jury," and the movant "must specify the judgment sought and the law and facts that entitle the movant to the judgment." "The requirement in Rule 50(a)(2) that the grounds be stated on a motion for judgment as a matter of law before submission of the case to the jury is mandatory." 9B C. Wright & A. Miller, Federal Practice and Procedure § 2532 at 495 and n.4 (3d ed. 2008) (collecting cases) (hereinafter Wright & Miller). "The purpose of this requirement is to assure the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment." Fed. R. Civ. P. 50, Advisory Committee Notes of 1991 Amendment.

"Rule 50(b), by contrast, sets forth the procedural requirements for renewing a sufficiency of the evidence challenge after the jury verdict and entry of

judgment." *Unitherm Food Sys., Inc.*, 546 U.S. at 400. Because the Rule 50(b) post-verdict motion is nothing more than a renewal of the earlier pre-verdict motion, a party's renewed motion cannot assert a new legal defense or theory that was not included in the earlier pre-verdict motion. *Id.* at 405 (the "text [of Rule 50(b)] provides that a district court may only order a new trial on the basis of issues raised in a preverdict Rule 50(a) motion when 'ruling on a renewed motion' under Rule 50(b)."); Fed. R. Civ. P. 50, Advisory Committee Notes of 1991 Amendment ("A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion."). *See also* Wright & Miller § 2537 at 606. The rule protects the Seventh Amendment right to trial by jury and ensures that the opposing party has sufficient notice of the alleged error to permit an attempt to cure it before resting. Fed. R. Civ. P. 50, Advisory Committee Notes of 1991 Amendment ("purpose of the concept [that post-verdict motion is a renewal of an earlier pre-verdict motion] was to avoid any question arising under the Seventh Amendment."); *Morante v. American General Financial Ctr.*, 157 F.3d 1006, 1010 (5th Cir. 1998) ("[i]t would be a constitutionally impermissible re-examination of the jury's verdict for the district court to enter judgment n.o.v. on a ground not raised in the motion for directed verdict.") (quoted case omitted).

While this Court has never addressed the precise issue, other courts of appeal have squarely held that a district court may not do what the district court did here after the jury verdict – raise on its own initiative a new issue that was not raised by a party in its pre-verdict Rule 50(a) motions and proceed to overturn the jury verdict on that basis. *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 903 (11th Cir. 2004). ("this

Court also has instructed that a district court does not have the authority under Rule 50(b) to rule *sua sponte* on issues not raised by the parties"); *American and Foreign Ins. Co. v. Bolt*, 106 F.3d 155, 159 (6th Cir. 1997) ("allowing a judge to sua sponte raise a new issue post-verdict, and proceed to overturn a jury verdict on that basis contravenes the dictates of Rule 50(b)"); *Murphy v. City of Long Beach*, 914 F.2d 183, 186 (9th Cir. 1990) ("[f]or the same reasons a party may not seek a [judgment as a matter of law] on grounds not alleged in their motion for directed verdict, a district court may not enter [judgment as a matter of law] on grounds not asserted in a party's motion for directed verdict"); *Kutner Buick, Inc. v. American Motors Corp.*, 868 F.2d 614, 617 (3d Cir. 1989) (district court had no discretion to overturn a jury verdict on grounds not advanced by a party in its Rule 50 motions); *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 172 (5th Cir. 1985) (district court abused its discretion in granting judgment as a matter of law on an issue neither party raised at any point during trial).

B. The proceedings before the district court.

1. Background and the jury verdict.

The underlying dispute involves a claim under Wisconsin law for breach of an indemnification agreement. In 1995, HK purchased the assets of one of Eaton's subsidiaries, Eaton-Kenway. (R. 343, P. Ex. 15.)[1] Eaton-Kenway, like HK, designed and built large automated material handling systems. In the transaction, HK acquired from Eaton-Kenway over

[1] All "R" citations are to the record of the district court proceedings. All "P. Ex." citations are to the plaintiff's exhibits admitted into evidence at trial.

75 projects in different states of completion, including a project for IBP, a large beef processor, to replace its automated material handling system. (R. 343, P. Ex. 15.) Because HK was taking over on-going Eaton-Kenway projects, Eaton agreed to indemnify HK and hold it harmless from any losses "resulting from" Eaton-Kenway's "acts or omissions" or the "occurrence of a matter ... relating to or arising out of the period on or before" HK purchasing Eaton-Kenway's assets. (App. 49a–50a.)

After HK left the IBP project, IBP sued HK based on claims grounded largely on Eaton-Kenway's pre-closing conduct. Eaton and HK expressly listed the IBP project as covered by their indemnification agreement, but Eaton refused to indemnify HK or participate in the defense. (R. 343, P. Ex. 15; R. 343, P. Ex. 46.) After funding, defending and settling the IBP litigation, HK sued Eaton for breach of contract.

Both parties moved for summary judgment in the district court, and the district court initially granted summary judgment to HK. (R. 133.) After Eaton moved to reconsider, the court withdrew the grant of summary judgment to HK and again denied Eaton's motion for summary judgment because there were genuine issues of material fact as to whether HK's losses "resulted from" Eaton-Kenway's conduct. (App. 55a, 57a.) A jury trial followed.

At trial the jury heard evidence – much of it uncontested – showing that HK's losses resulted from Eaton-Kenway's conduct in the IBP project before HK took over. This evidence showed that not only had Eaton-Kenway won the bid for, priced and materially designed the system for IBP, but that Eaton-Kenway had repeatedly promised IBP in writing that the system it designed would "meet or exceed" IBP's func-

tional requirement to move 3,197 cases of beef per hour, day after day, hour after hour, from storage to the delivery trucks. (R. 343, P. Ex. 6.) Contrary to what Eaton-Kenway had promised IBP, however, the system Eaton-Kenway designed could only achieve that rate as a "peak" or maximum rate, not as a sustainable rate under IBP's normal use. (R. 351:368) The jury also heard that after HK took over the IBP project, HK had expressly clarified in a proposal to IBP that the rates were maximum rates, not sustainable rates, and that IBP accepted HK's proposal. (R. 351:445.) Although HK delivered the system having the rates IBP agreed to in HK's proposal, IBP repeatedly told HK that it wanted a system having the higher rates Eaton-Kenway expressly promised, pointing to Eaton-Kenway's earlier written promises that the system would "meet or exceed" IBP's requirements. (R. 343, P. Exs. 30, 39.) So IBP sued HK, and HK found itself defending claims based on Eaton-Kenway's pre-closing conduct. (R. 4.)

Consistent with the terms of HK's and Eaton's indemnification agreement, the district court instructed the jury at the close of evidence that the issue was whether HK suffered losses "resulting from" Eaton-Kenway's "acts or omissions" or the "occurrence of a matter" prior to HK purchasing Eaton-Kenway. (R. 352:710.) While the district court had earlier defined "resulting from" in denying both parties summary judgment, the court gave no special jury instruction on the meaning of "resulting from" and the causation issue was submitted to the jury. (R. 352:565–66, 616; R. 352:718.) So charged, the jury returned a verdict expressly finding that a portion of HK's losses "resulted from" Eaton-Kenway's pre-acquisition conduct and awarded damages. (App. 66a–67a.)

2. The district court vacates the jury verdict.

Eaton moved for judgment as a matter of law under Rule 50 at the close of HK's case, at the close of all evidence, and again after the jury verdict. (R. 325; R. 326; R. 353.) The district court also allowed Eaton, over HK's objection, to take the unprecedented step of filing—post-jury verdict—a motion to reconsider the court's denial of Eaton's pre-trial summary judgment motion along with disputed proposed findings of fact supported by information never admitted into evidence at trial. (R. 359.)

Nine months after the jury verdict, and without any prior notice, the district court announced that it was vacating the jury verdict based on a new theory Eaton never before raised in any of its pre-trial or post-verdict motions. (App. 48a–61a.) While the district court never gave the jury any special instruction defining "resulting from" – and no party has ever contended the indemnification clause is ambiguous – the district court explained that it had concluded that its previous definition of causation was clearly wrong. (App. 38a.) The district court then stated that in order to "harmonize" the asset purchase agreement's two indemnification provisions – Eaton's obligation to indemnify HK and HK's obligation to indemnify Eaton (the latter not even being at issue in the case) – it would interpret "resulting from" as "requiring Eaton to indemnify HK only where Eaton or Eaton-Kenway's act or omission (or a pre-closing occurrence) directly gives rise to a claim against HK." (App. 27a.) Under the district court's new causation standard, "if a significant intervening and superseding event separated the act, omission or occurrence from the claim, a loss ensuing from the

claim could not be fairly said to result from the claim." (App. 27a.)

The district court concluded that under this new standard "no reasonable jury could find" that any of HK's losses resulted from Eaton-Kenway's conduct because the agreement between HK and IBP to complete the project was an intervening or superseding cause of any losses HK had suffered as a result of being sued by IBP.[2] The judge did initially determine that another more limited trial was necessary, but on Eaton's motion to reconsider the district court determined that "HK's claim for indemnification fails as a matter of law." (App. 8a.)

The district court's opinion on what a reasonable jury could conclude made no reference to the trial evidence and, as the Seventh Circuit pointed out, the trial evidence did not bear on the judge's decision. (App. 5a.) In fact, the district court stated that it was denying Eaton's Rule 50(b) motion as "moot" and, instead, was reconsidering its pre-trial denial of Eaton's summary judgment motion to overturn the jury verdict and grant judgment as a matter of law. (App. 38a.) The district court believed that Fed. R. Civ. P. 54(b) authorized it after a trial and jury verdict to reconsider its earlier pre-trial summary judgment ruling, because "pre-judgment decisions are subject to revision before the entry of final judgment." (App. 13a.) It is undisputed that Eaton never asked the district court to interpret the phrase

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[2] In its subsequent decision and order denying Eaton's post-trial motion for sanctions, however, the district court stated that HK "had a strong argument that Eaton-Kenway's misrepresentation spawned the IBP litigation. Indeed, it is quite likely that the IBP suit would not have happened but for Eaton-Kenway's conduct." (App. 62a.)

"resulting from," or any other term in the indemnification clause, in either its Rule 50 motions or in its improper renewed summary judgment motion.[3]

C. The Seventh Circuit affirmed.

The Seventh Circuit stated that Eaton clearly waived the new issue raised by the district court by not raising it before the jury verdict: "[b]y not preserving, in its motion for judgment as a matter of law, its argument that HK was the author of its loss in the suit by IBP – which would have preserved the argument for appeal – Eaton took a big risk." (App. 3a.) The court further noted that the district court's inappropriate practice of reconsidering summary judgment ***after*** the trial and jury verdict "may seem odd," and that "an appellate court will generally refuse to review the denial of a motion for summary judgment after the case has been tried." (App. 3a.) The court of appeals concluded that it was, like the district court, nonetheless free to disregard the trial evidence and jury verdict:

> But the justification for refusing [to review a decision denying summary judgment after the jury trial and verdict] fails when the motion is denied

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[3] Instead, Eaton argued that HK's right to indemnification turned on whether there was a binding contract between Eaton-Kenway and IBP, because (it reasoned) without a contract Eaton-Kenway's conduct could not have caused HK's losses. (R. 361.) This argument ignores that Eaton and HK expressly listed the IBP project as covered by their indemnification agreement. Eaton also argued that HK had to (but did not) prove that there was something "inherently wrong" with Eaton-Kenway's proposed design. (R. 361.) The indemnification clause contains no such requirement, and what was "inherently wrong" was that Eaton-Kenway repeatedly misled IBP about the system's capabilities.

> because of a ruling on a pure question of law rather than on the adequacy of the evidence presented in opposition to the motion.... For then if the ruling was erroneous and the motion should have been granted regardless of the evidence, the trial is an irrelevance. And that is this case.

(App. 3a.)

The record is undisputed, however, that the district court denied Eaton's summary judgment motion because there were disputed facts requiring trial. (App. 55a, 57a.) In fact, Eaton's appeal brief asked the court to review the district court's findings of fact for "clear error" – the standard of review for a bench trial – and Eaton repeatedly cited to disputed "evidence" outside the trial record to support its case.[4] (App. 68a-70a.)

In any event, the Seventh Circuit reasoned that because "Eaton failed as we said to preserve its challenge to the alleged error (in denying its motion for summary judgment) in its motion for judgment as a matter of law," "it had to throw itself on the judge's mercy," and "the exercise of mercy was within his discretion." (App. 4a.) The court concluded that "in revisiting the issue of causation after the trial [the district court] was not depriving HK of the benefit of any of the evidence presented at the trial, because that evidence did not bear on the judge's decision." (App. 5a.)

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[4] HK asked the court of appeals to strike Eaton's attempt to retry the case on appeal. *See* HK's Reply Brief at 3-4. The court of appeals neither addressed HK's argument nor struck Eaton's version of the facts based on evidence not in the trial record.

The Seventh Circuit then affirmed the district court's finding of fact that no reasonable jury could find for HK because under the indemnification agreement none of HK losses resulted from Eaton-Kenway's acts or omissions. According to the court of appeals, HK was seeking indemnification for the consequences of activity that was within its control after it entered into the agreement with IBP. (App. 8a.) The Seventh Circuit supported its conclusion with several findings of fact. For example, the court of appeals found that "[t]hinking that it would be indemnified for any losses on its contract with IBP, HK had a diminished incentive to try and minimize its potential liability for such losses in negotiating the terms of the contract." (App. 8a–9a.) The court of appeals also found that HK had the opportunity to insist on terms with IBP that would have protected itself from liability if it could not perform up to IBP's expectations, "and it muffed it." (App. 7a.) Like the district court, the Seventh Circuit never mentioned the contrary evidence at trial or gave it any weight in affirming the district court's decision to vacate the jury verdict and grant judgment as a matter of law to Eaton.

REASONS FOR GRANTING THE PETITION

1. The decision below creates a circuit conflict on an important and frequently recurring issue of federal civil procedure: the authority of a district court judge to raise a new issue post-jury verdict that Rule 50(b) would have barred a party from raising. At least five other Circuits have squarely held that a district court has no authority to sua sponte raise a new issue after trial and overturn the jury verdict on that new basis. The Seventh Circuit by contrast held that a district court has discretion to "exercise mercy"

and sua sponte raise a new issue to overturn a jury verdict. Simply put, the Seventh Circuit's view of a court's authority to raise new issues after trial to overturn a jury verdict conflicts with those of all other Circuits that have considered the issue. This conflict is ongoing and creates an unfairness to litigants in different circuits by allowing a party in one circuit the benefit of asking a district court to "exercise mercy" and overturn a jury verdict that would be denied elsewhere as contrary to Rule 50(b) and the Seventh Amendment. The district courts conduct literally thousands of civil jury trials each year, and there should be a uniform rule that is generally applied across circuits. Only this Court can resolve the conflict and bring clarity to this important and recurring issue of federal civil procedure. That is reason enough to grant the petition for certiorari.

2. In straining to avoid Rule 50(b) and conflicting cases from other circuits, the Seventh Circuit also created a direct conflict with a decision by this Court that raises a serious Seventh Amendment issue. This Court in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-52 (2000) set forth a clear, uniform rule that before a court may grant judgment as a matter of law after trial it must consider all of the trial evidence and give the nonmoving party the benefit of all reasonable inferences from that evidence. Indeed, this Court reversed a lower court that failed to do this as impermissibly substituting its judgment concerning the weight of the evidence for that of the jury. *Id.*

This case is indistinguishable from *Reeves*. As in *Reeves*, the district court gave no weight to the trial evidence when it "reconsidered" its denial of a pretrial summary judgment motion, concluded that no

reasonable jury could find for HK, overturned the jury verdict on that basis, and granted judgment as a matter of law. The only difference is that unlike this Court in *Reeves*, the Seventh Circuit endorsed this practice by announcing a novel rule that if the new issue raised after trial is an "issue of law," the trial is an irrelevance and it matters not at all whether the trial evidence influenced the district court's decision to grant judgment as a matter of law. By so holding the Seventh Circuit directly undermined the clear, uniform rule in *Reeves* and the jury's role to weigh contested evidence and find facts. That is an intolerable situation that directly impairs a party's Seventh Amendment right to a jury trial. The lower courts' failure to apply *Reeves* justifies this Court's intervention to resolve on ongoing conflict with its precedent.

I. This Case Squarely Presents The Conflict On Whether A District Court Can Raise A New Issue After Trial To Overturn A Jury Verdict On That New Basis.

This Court has held that under Rule 50(b) a district court may only grant a motion for judgment as a matter of law after a jury verdict on the basis of issues a party raised in a pre-verdict Rule 50(a) motion. *Unitherm Food Sys., Inc.*, 546 U.S. at 405. Indeed, the 1991 Committee notes to Rule 50 expressly point out that "[a] post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion." Fed. R. Civ. P. 50, Advisory Committee Notes of 1991 Amendment. There is no question that the district court here vacated the jury verdict and entered judgment as a matter of law based on a ground never advanced by any party in their pre- or post-verdict motions. The Seventh Cir-

cuit expressly acknowledged that Eaton "failed to preserve its challenge to the alleged error" by not raising the issue in its Rule 50(a) pre-verdict motions. Yet the lower court held that a district court has "discretion" to sua sponte "exercise mercy" and raise a new issue to overturn the jury verdict. The Seventh Circuit's decision squarely conflicts with published decisions from at least five other circuits that have addressed the issue, as a brief review of these cases demonstrates.

In *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 896 (11th Cir. 2004), the district court raised a new issue after trial never raised by either party in its Rule 50 motions, requested post-trial briefing on this new issue, and then vacated the jury verdict and granted judgment as a matter of law on that new basis. The Eleventh Circuit reversed, holding that "the district court clearly erred because it lacked authority to enter judgment under Rule 50(b) for the defendants on a ground not raised prior to the submission of the case to the jury." *Id.* at 902-03. "Just as we would not permit defendants who had made no previous motion to ask the court to rule on the legal sufficiency of the evidence once a verdict had been returned against them, we cannot permit the district court to so rule sua sponte." *Id.* at 903. The Eleventh Circuit observed that this rule ensures that a party is not "ambushed" or "sandbagged" after trial when it is too late to address alleged insufficiencies in the evidence and "is consistent with those of our sister circuits." *Id.* at n.11.

In *American and Foreign Ins. Co. v. Bolt*, 106 F.3d 155 (6th Cir. 1997), the district court granted judgment as a matter of law on a new legal theory it raised *sua sponte* after the jury verdict and that was not raised by the parties in their Rule 50 motions.

The Sixth Circuit reversed, holding that "allowing a judge to *sua sponte* raise a new issue post-verdict, and proceed to overturn a jury verdict on that basis contravenes the dictates of Rule 50(b)." *Id.* at 159. The Sixth Circuit concluded that the district court's action contravened the text of Rule 50, which required that parties raise important issues before the case was submitted to the jury, and the purpose of that rule "was to avoid any question arising under the Seventh Amendment." *Id.* at 160 (quoting Advisory Committee Notes to the 1991 Amendment) (emphasis added). Indeed, "it seems illogical to this Court to permit a judge to overturn a jury verdict on his own motion, where the rule specifically forbids him to grant the same motion were it brought by one of the parties." *Id.*

In *Murphy v. City of Long Beach*, 914 F.2d 183, 185 (9th Cir. 1990), the district court granted the plaintiff judgment as a matter of law (then called "judgment notwithstanding the verdict") and overturned a jury verdict on a ground the plaintiff never raised in its Rule 50 motion for a directed verdict. The Ninth Circuit reversed, holding that "[f]or the same reasons a party may not seek a [judgment as a matter of law] on grounds not alleged in their motion for directed verdict, a district court may not enter [judgment as a matter of law] on grounds not as serted in a party's motion for directed verdict." *Id.* at 186.

In *Kutner Buick, Inc. v. American Motors Corp.*, 868 F.2d 614, 617 (3d Cir. 1989), the district court overturned the jury verdict and granted judgment as a matter of law on grounds not advanced by the defendants in their Rule 50 motions. The Third Circuit reversed, holding that a district court had no

discretion to overturn a jury verdict on grounds not advanced by a party in its Rule 50 motions. *Id.*

In *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 171 (5th Cir. 1985), the jury returned a verdict and the district court overturned that verdict on the basis of collateral estoppel even though neither party had raised that ground at any point during trial. The Fifth Circuit reversed, citing the text of Rule 50 and holding that "the district court abused its discretion in granting JNOV on the basis of collateral estoppel. . . ." *Id.* at 172.

The two cases the Seventh Circuit cited as supporting its decision, *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 718-19 (7th Cir. 2003) and *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1227 (7th Cir.1995), are not on point and do not alleviate the sharp circuit conflict. *Chemetall* held that while a court of appeals will normally refuse to review a district court's denial of summary judgment after a trial on the merits, there is an exception to that rule when the motion raised legal issues other than the sufficiency of the evidence. *Chemetall*, 320 F.3d at 719. As that Seventh Circuit panel noted, however, at least the Fourth Circuit has squarely rejected this position because "it is often difficult to determine ... whether the basis for the district court's denial of the motion was legal or factual and that the issue can be preserved for appeal by raising it in a motion for judgment as a matter of law under Rule 50." *Id.* Here, the district court expressly denied Eaton's summary judgment motion on the factual basis that a trial was necessary to resolve disputed facts. (App. 55a, 57a). That fact alone distinguishes this case from *Chemetall*. Nothing in *Chemetall* even suggests that a court of appeals may review after

trial a summary judgment denied on the sufficiency of the evidence, or that a district court may after trial sua sponte raise a new issue and disregard the trial evidence to overturn a jury verdict. Yet that is exactly what happened here.

Avitia simply held that the law of the case doctrine did not bar a district court from reversing an earlier erroneous decision to give a jury instruction asked for by the plaintiff. 49 F.3d at 1227-28. Nothing in *Avitia* suggests that a district court may raise a new issue after trial that Rule 50(b) bars a party from raising on its own and overturn a jury verdict on that new basis, let alone treat the trial as an irrelevance.

The cases from the Third, Fifth, Sixth, Ninth, and Eleventh Circuits stand for the principle that a district court may not raise a new issue post jury verdict that Rule 50(b) would have barred a party from raising. Indeed, these courts have held that a district court lacks any authority under Rule 50(b) to do so and that to hold otherwise would raise serious Seventh Amendment issues. The Seventh Circuit's decision here, by contrast, stands for the principle that a district court is entitled to raise a new issue that Rule 50(b) would bar a party from raising and, furthermore, that a district court can decide that new issue based on an earlier pre-trial summary judgment record, not the trial record. Whether a district court may raise and address new issues after a trial that were never before raised by either party is a sufficiently important question not heretofore considered by this Court that warrants review. Without resolution of this issue by this Court, the lower courts will continue to disagree over a district court's authority to overturn a jury verdict and enter judgment as a matter of law.

This conflict is also recurring and of practical importance. The district courts conduct literally thousands of civil jury trials each year, and Rule 50 is implicated in nearly every one of those cases. In some circuits a party cannot ask a district court to exercise discretion post-jury verdict and address an issue the party failed to raise (and therefore waived) in its pre-verdict motions, thereby avoiding any question arising under the Seventh Amendment. In at least the Seventh Circuit, however, a party can ask a district court to "exercise mercy" and vacate a jury verdict on an issue the party never raised (and therefore waived) during trial. This important issue regarding a district court's authority to sua sponte raise new issues to vacate jury verdicts requires a general rule uniformly applied across circuits. That there is no uniform rule presents an intolerable situation as the practical impact is that a district court's authority to grant judgment as a matter of law in civil jury trials varies by circuit.[5]

II. The Lower Court's Decision Also Conflicts With A Decision Of This Court On An Important And Recurring Seventh Amendment Issue.

This Court in *Reeves* adopted a uniform rule that a court must consider all of the trial evidence when

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[5] The court of appeals never addressed the district court's rationale that Fed. R. Civ. P. 54(b) permits a court to revisit its earlier summary judgment ruling, raise a new issue after trial, disregard the trial evidence, and vacate the jury verdict based on that new issue. In that regard, the district court's decision directly conflicts with the decisions of other Circuits cited above that have addressed this issue and held that a district court has no such authority.

deciding whether to overturn a jury verdict and grant judgment as a matter of law. In *Reeves* the court of appeals held that the record contained insufficient evidence to support the jury verdict and the movant was entitled to judgment as a matter of law, but the court disregarded evidence critical to the petitioner's case and failed to draw all reasonable inferences in favor of the nonmovant. *Reeves*, 530 U.S. at 152-53. This Court noted that while some courts considered the entire trial record when granting judgment as a matter of law, other courts considered only the nonmovant's evidence in determining whether to grant judgment. *Id.* at 149-50. The Court resolved that conflict by holding that Rule 50 requires a court to "review *all* of the evidence in the record." *Id.* at 150. In reaching that decision, the Court observed that in the analogous context of ruling on summary judgment before trial under Rule 56, the court "must review the record 'taken as a whole,'" and "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Id.* (quoted cases omitted.) It therefore followed that in deciding whether to grant judgment as a matter of law the court must review all of the trial evidence. *Id.* In doing so "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence" and "it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 150-51. Applying that standard the Court reversed the court of appeals, as the lower court "misapplied the standard of review dictated by Rule 50" and "impermissibly substituted its judgment concerning the weight of the evidence for the jury's." *Id.* at 153.

The Seventh Circuit's decision here conflicts with that uniform rule announced in *Reeves*. Indeed, the facts in this case and this Court's decision in *Reeves* are substantially indistinguishable. In this case, like *Reeves*, the case was tried to a jury and the jury returned a verdict. In this case, like *Reeves*, the court decided that the evidence did not support the jury verdict and granted judgment as a matter of law. In this case, like *Reeves*, the lower court did not consider the trial evidence supporting the jury verdict or draw all inferences favorable to the nonmoving party. As the Seventh Circuit candidly pointed out, the trial evidence and jury verdict "did not bear on the judge's decision" when the district court "revisited the causation issue" after trial, concluded that no reasonable jury could find for HK, and granted judgment as a matter of law to Eaton. (App. 5a.) Indeed, the only material distinction between this case and *Reeves* is that in *Reeves* the court selectively considered some of the trial evidence, while in this case the lower courts determined the trial was an irrelevance. That fact only underscores the conflict with this Court's decision in *Reeves*. The failure to follow *Reeves* is reason enough to grant the petition.[6]

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[6] The Seventh Circuit reasoned that the district court was free to disregard the trial evidence because the district court had denied Eaton's pre-trial summary judgment motion on "a pure question of law" rather than "the adequacy of the evidence presented in opposition to the motion." (App. 3a.) Even if that novel proposition of law is true (and it is contrary to *Reeves*), the record is clear that the district court expressly denied Eaton's summary judgment motion because "there is a genuine issue of material fact as to whether Eaton's conduct contributed to HK's losses" and "the record contains evidence from which a reasonable jury could infer that HK suffered losses resulting from

An additional reason is that the Seventh Circuit's point that the district court was "revisiting the issue of causation" after trial, but gave the trial evidence no weight, demonstrates how HK's Seventh Amendment rights were ignored. Under Wisconsin law causation is an issue of fact for a jury. *Helmbrecht v. St. Paul Ins. Co.*, 122 Wis. 2d 94, 125, 362 N.W.2d 118 (1985) ("causation and damages are issues of fact"). Rule 50 "has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact – a jury being the constitutional tribunal provided for trying facts in courts of law." *Berry v. U.S.*, 312 U.S. 450, 453 (1941) (footnote omitted). The act of interpreting a contract may be an issue of law, but whether HK had a contractual right to indemnification because of Eaton-Kenway's conduct – that is, whether HK's losses "resulted from" Eaton-Kenway's conduct – could not be decided by looking solely to the contract alone but required a resolution of disputed facts about the "who, what, when, where and why" regarding Eaton-Kenway's and HK's conduct on the IBP project. *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384, 386 (1949) (resolving "the conflict between these competing theories of causation" was a "decision ... for the jury," not the court). "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35 (1944). "Judges betray their function when they arrogate

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Eaton's actions in connection with the fraud in the inducement claim." (App. 55a, 57a.)

themselves over the legal factfinder." *Anderson v. Fuller*, 455 U.S. 1028, 1033 (1982) (Burger, C. J., dissenting from denial of petition for certiorari).

The lower courts' decisions here are a case in point, as they recite "facts" from a disputed pre-trial summary judgment record that are different than the facts in the trial record. For example, the Seventh Circuit concluded that HK "muffed" the opportunity to take measures to protect itself from liability, and that HK should not have signed the construction contract with IBP "without first making sure that its new acquisition, Eaton-Kenway, would be able to fulfill the duties that the contract placed on its new parent." (App. 7a.) To begin with, HK acquired Eaton-Kenway's assets, not Eaton-Kenway; HK was not the "parent" of Eaton-Kenway. (R. 343, P. Ex. 15.) More importantly, as explained in Section III, the trial evidence was that HK did take precautions to protect itself from liability. The district court and Seventh Circuit simply ignored the trial evidence favorable to HK and gave it no weight. That is directly contrary to this Court's decision in *Reeves* and violates a party's Seventh Amendment right.

III. The Lower Courts' Decisions Are Incorrect.

A theme running through the Seventh Circuit's (and the lower court's) opinion is that HK was the author of its loss and sought indemnification for its own acts, not Eaton-Kenway's acts. But the trial record contradicts this finding and supports the jury verdict. To begin with, it is undisputed that Eaton and HK expressly listed the IBP project as covered by their indemnification agreement. Moreover, the jury had ample evidence – much of it uncontested and in

HK's favor – to conclude that by the time HK purchased the Eaton-Kenway business, Eaton-Kenway's work marketing, selling and designing the system created the basis on which IBP later asserted liability against HK. IBP sued HK based on Eaton-Kenway's acts, omissions, and pre-closing occurrences, and HK was entitled to indemnification for its losses from Eaton-Kenway's conduct. Some of the evidence the jury heard on this issue is as follows:

- IBP issued written specifications for the system it wanted, and Eaton-Kenway reduced the price of its bid to $14.3 million by removing and changing equipment it included in its original proposed system (thereby reducing the system's capabilities). (R. 350:319–26; R. 351:391–92.)
- Eaton-Kenway promised IBP that the system Eaton-Kenway designed and proposed "meets [IBP's] requirements for the least cost to IBP." (R. 343, P. Ex. 6.)
- When IBP sought confirmation that the system Eaton-Kenway designed would meet its outbound throughput rate requirements of 3,197 cases per hour, Eaton-Kenway expressly stated in writing that it would "meet or exceed these requirements." (R. 343, P. Ex. 6.)
- Eaton-Kenway and IBP had already agreed upon the equipment, the conveyor and the automatic storage and retrieval systems layouts for the IBP project and the price of $14,300,000 before HK purchased the assets. (R. 350:340.)
- Eaton-Kenway told HK during due diligence that the design met IBP's throughput requirements and that "the scope of work [on the IBP project] was completely final. It was final. Definitized." (R. 349:81.)

- During a program review meeting with IBP, Eaton-Kenway again guaranteed the stated throughput requirements for IBP. (R. 349: 80-82.)
- IBP issued a purchase order for $500,000 based on the "letter of intent signed by IBP and Eaton-Kenway/Alvey on December 16, 1994, for a system as agreed for 14,300,000." (R. 343, D. Ex. 1684.)

The Seventh Circuit concluded that HK nonetheless, somehow, had the chance to protect itself from liability based on Eaton-Kenway's representations about throughput but "muffed it." (App. 7a.) The lower court's conclusion that HK "muffed" the project also implies that HK failed to build and deliver what it promised. The facts at trial showed otherwise. The jury heard that HK did attempt to protect itself by expressly clarifying in a subsequent proposal that "All Rates are Maximum," and that IBP accepted that proposal. (R. 351:445.) The trial evidence is also that HK built the system and it worked: IBP started using the system, HK successfully completed the integration subsystem functional testing, left the site and, by September 1997, put the project into "a warranty status" to support IBP's daily operations. (R. 351:382-86) HK delivered what it had promised – a system according to Eaton-Kenway's design having an outbound throughput rate of 3,197 cases per hour as a "peak" or maximum rate, as set forth in HK's March 15 proposal. (R. 351:382-86).

But the jury heard uncontested evidence that IBP could not have cared less and repeatedly told HK that it purchased a system having the rates Eaton-Kenway promised. IBP never mentioned HK's post-closing proposal that all rates were maximum. IBP's

complaints and suit against HK was predicated directly on Eaton-Kenway's written guarantee:

> Q At the end of the project ... what was the dispute about throughput?
>
> A Fundamentally we had had discussions through the summer of 1997 with IBP that said on a day to day basis the most you can expect this system to deliver would be twenty-two to twenty-four hundred boxes per hour on the outbound side. And that was the dispute. They wanted that number to be 3,797 [sic].
>
> Q Did they say they had been promised that number?
>
> A Yes.
>
> Q By whom?
>
> A They referred back to [Eaton-Kenway's] R. K. Long letter.

(R. 351:467–68.)

Indeed, the jury heard testimony that IBP's greatest concern and the issue it focused its ire upon was the outbound throughput rate not "meeting or exceeding" its expectations. The result was a lawsuit; indeed, IBP amended its complaint against HK to expressly refer to Eaton-Kenway, stating that "all allegations regarding Eaton-Kenway are imputed to [HK] and allegations regarding [HK] include the acts of Eaton-Kenway prior to its purchase and assumption by [HK]." (R. 4.) After expending millions to defend (and partially succeed upon) IBP's claims, HK faced a trial on six of IBP's counts, including an alleged violation of Nebraska's uniform deceptive trade practices act. Nor is there any dispute that Eaton refused to participate in the IBP litigation or contribute to the settlement.

A jury could (and did) reasonably conclude that IBP's expectations of throughput, grounded as they were in Eaton-Kenway's pre-closing acts and omissions, drove the subsequent dispute and IBP lawsuit against HK. The evidence is more than sufficient to sustain the jury verdict that HK incurred indemnifiable losses "resulting from" Eaton-Kenway's acts and omissions, and the "occurrence of a matter" with respect to Eaton-Kenway's design and sale of the IBP system. The lower courts erred when they ignored this trial evidence, gave it no weight, and entered judgment as a matter of law for Eaton. *Reeves*, 530 U.S. at 150-51.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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May 29, 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 07-3596

HK SYSTEMS, INC.,
Plaintiff-Appellant,

v.

EATON CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 02-C-1103—Lynn Adelman, Judge.

Argued September 3, 2008
Decided January 28, 2009

Before POSNER, RIPPLE, and EVANS, *Circuit Judges*.

POSNER, Circuit Judge. This is a diversity suit for breach of contract. The substantive issue, one of Wisconsin law, is the scope of an indemnification clause in a contract for the sale of a business. The clause required the seller, defendant Eaton, to indemnify the buyer, plaintiff HK, for all losses resulting from any "misrepresentation," "act or omission," or "occurrence of a matter . . . relating to or arising out of the period on or before the Closing Date."

IBP, a large beef processor, wanted to replace the auto-mated material-handling system in its beef-processing plant in Nebraska. Eaton-Kenway, a subsidiary of Eaton, and another company, Alvey, submitted a joint bid in response to IBP's request for proposals. IBP liked the bid and in December 1994 issued a two-sentence letter of intent to purchase the new system from the joint bidders.

Two months later, while IBP and the joint bidders were in the midst of negotiations aimed at transforming the bid into a contract, Eaton sold Eaton-Kenway to HK. The following month IBP signed a contract with HK for the material-handling system, with Alvey a subcontractor of HK. That is the contract that contains the indemnification clause. Eaton had nothing to do with the contract negotiations after it sold Eaton-Kenway to HK.

Three years later, IBP sued HK in Nebraska for fraud and breach of contract. The fraud claim was that before the sale of Eaton-Kenway to HK Eaton had misrepresented to IBP the speed at which the material-handling system would operate. The breach of contract claim was that the system did not operate at the speed promised in the contract. The suit was settled, HK agreeing to pay IBP $8 million, though Alvey contributed $5 million of that amount. HK then brought this suit against Eaton for indemnification.

Eaton moved for summary judgment on the ground that the loss HK had incurred in settling IBP's suit had been caused not by Eaton but by HK's own actions. The district judge denied the motion and the case proceeded to trial. Eaton moved for judgment as a matter of law, which the judge denied, and the jury awarded a little more than $3 million to HK. But Eaton then moved the judge to reconsider his earlier

denial of its motion for summary judgment, and the judge granted the motion and dismissed the suit, precipitating this appeal by HK.

The judge's action in reconsidering his denial of summary judgment after the jury's verdict may seem odd; HK argues that it was improper. Although the standard for granting summary judgment is the same as the standard for granting judgment as a matter of law, *Klunk v. County of St. Joseph*, 170 F.3d 772, 775 (7th Cir. 1999), the record compiled in a trial is bound to differ from the record on which a motion for summary judgment is based. Even if the motion should have been granted when made, any evidence properly admitted at trial is available for consideration if the judge is asked after the trial to reconsider his earlier denial of the motion—and if the opposing party has presented a convincing case at trial the inference is that the judge was right to deny the motion. So an appellate court will generally refuse to review the denial of a motion for summary judgment after the case has been tried. *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 718-19 (7th Cir. 2003). But the justification for refusing fails when the motion is denied because of a ruling on a pure question of law rather than on the adequacy of the evidence presented in opposition to the motion. *Id.* at 719-20, and cases cited there. For then if the ruling was erroneous and the motion should have been granted regardless of the evidence, the trial is an irrelevance. And that is this case.

But by not preserving, in its motion for judgment as a matter of law, its argument that HK was the author of its loss in the suit by IBP—which would have preserved the argument for appeal—Eaton took a big risk. The doctrine of law of the case counsels against

a judge's changing an earlier ruling that he made in the same case, *Agostini v. Felton*, 521 U.S. 203, 236 (1997); *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816-17 (1988); *Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 571-72 (7th Cir. 2006), or that his predecessor as presiding judge had made. *Fujisawa Pharmaceutical Co. v. Kapoor*, 115 F.3d 1332, 1339 (7th Cir. 1997); *In re Engel*, 124 F.3d 567, 583-85 (3d Cir. 1997). The doctrine has greater force in the second type of case—when there is a change of judges during the litigation and the new judge is asked to revisit the rulings of his predecessor. Reluctance to admit one's own errors discourages casual reconsideration of one's own rulings—but not of another judge's rulings. There was no change of judges here.

The doctrine of law of the case was applied to a motion to reconsider a summary judgment ruling in *Fye v. Oklahoma Corp. Comm'n*, 516 F.3d 1217, 1223-24 (10th Cir. 2008), and doubtless in other cases as well. And while the doctrine obviously does not prevent an appellate court from correcting a trial judge's error, *e.g.*, *United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1101-02 (9th Cir. 2008), Eaton failed as we said to preserve its challenge to the alleged error (in denying its motion for summary judgment) in its motion for judgment as a matter of law. So it had to throw itself on the judge's mercy. But the exercise of mercy was within his discretion. "A judge may reexamine his earlier ruling (or the ruling of a judge previously assigned to the case, or of a previous panel if the doctrine is invoked at the appellate level) if he has a conviction at once strong and reasonable that the earlier ruling was wrong, and if rescinding it would not cause undue harm to the party that had benefited from it," *Avitia v. Metropolitan Club of Chi-*

cago, Inc., 49 F.3d 1219, 1227 (7th Cir. 1995). These conditions are satisfied; we'll see that the judge had a solid basis for thinking he had erred. And in revisiting the issue of causation after the trial he was not depriving HK of the benefit of any of the evidence presented at the trial, because that evidence did not bear on the judge's decision. He had denied summary judgment on the basis of his reading of the indemnification clause, and in reconsidering the denial after the trial he continued to treat the meaning of the clause as a pure issue of law, unrelated to anything that had gone on at the trial. He ruled that the indemnification clause did not make Eaton liable for any part of the loss that HK had sustained in settling IBP's suit, because the contract between HK and IBP was an "intervening and superseding cause" of the loss that HK had suffered as a result of being sued by IBP.

This was not the most perspicuous articulation that the judge could have given of the ground of his decision, though it is a common formula in Wisconsin cases, *see, e.g., Smith v. Katz*, 595 N.W.2d 345, 357 (Wis. 1999), as in cases in other states. The term "intervening [or superseding] cause," like "proximate cause," "legal cause," "chain of causation" (the "chain" that the "intervening cause" "breaks"), and "but for" cause belongs to an old-fashioned tort vocabulary. It would be clearer to speak in terms of responsibility, because the object of "causal" analysis in law is merely to determine who shall be responsible for some untoward event; in this case it is the loss that HK incurred as a result of the failure of the material-handling system to perform up to IBP's expectations—the failure that gave rise to IBP's suit against HK.

If a tanker truck spills oil, and a malicious passerby deliberately drops a lighted match into the re-

sulting pool, starting a fire that inflicts a loss on a third party, the victim cannot recover damages from the truck company even if the spill was caused by the company's negligence. The "reason" is said to be that the arson was an "intervening cause" of the loss. *Leposki v. Railway Express Agency, Inc.*, 297 F.2d 849 (3d Cir. 1962); *Giebel v. Richards*, 591 N.W.2d 901, 904 (Wis. App. 1999); *Stone v. Boston & Albany R.R.*, 171 Mass. 536, 536-43 (Mass. 1898); *cf. Scottsdale Ins. Co. v. Subscription Plus, Inc.*, 299 F.3d 618, 620-21 (7th Cir. 2002) (Wisconsin law). Yet an "intervening" criminal act is not always deemed to "break the causal chain"; a hotel is liable for its negligence that allows a criminal who is not employed by or otherwise affiliated with the hotel to commit a crime against a guest. *E.g., Shadday v. Omni Hotels Management Corp.*, 477 F.3d 511, 512-13 (7th Cir. 2007); *Wassell v. Adams*, 865 F.2d 849 (7th Cir. 1989). The difference between the two examples has nothing to do with causation. In both the loss is attributable to multiple factors (including, in the oil-spill case, the presence of oxygen in the atmosphere). Without all of them the loss would not have occurred. But the hotel is held responsible because its guests expect it to take reasonable measures to protect them, while the truck company is excused from responsibility because the probability of a mischief maker's chancing on a pool of oil and dropping a lighted match into it is so slight that imposing liability would not cause the company to take additional measures to avoid spills. *Jutzi-Johnson v. United States*, 263 F.3d 753, 755-56 (7th Cir. 2001). So liability would not enhance safety.

This is a multiple-factor case too, as shown by the presence of a mirror-image buyer's indemnification clause in the contract for the sale of Eaton-Kenway to HK. Not only was Eaton obligated to indemnify HK

for certain losses (the obligation that is the basis of the present suit), but HK was required to indemnify Eaton for losses resulting from "any act or omission of the Buyer [HK] or any occurrence of a matter with respect to the Subject Assets or the Subject Business relating to or arising out of the period after the Closing Date" of the sale. The loss of which HK is complaining would not have occurred had it not signed the contract with IBP, an "act" or "occurrence" that took place after the sale of the business. But this implies that if HK is entitled to indemnification from Eaton for the loss arising from the settlement of IBP's suit, Eaton is entitled to be indemnified by HK for Eaton's loss—the loss consisting of the judgment entered on the jury verdict in this case.

To break out of this ridiculous circle, the judge construed the indemnification clauses narrowly. In particular, he ruled that Eaton was required to indemnify HK only if Eaton's "act or omission . . . directly [gave] rise to a claim against HK." This condition had not been satisfied, the judge thought, because HK should not have signed the contract with IBP without first making sure that its new acquisition, Eaton-Kenway, would be able to fulfill the duties that the contract placed on its new parent. Had the sale not taken place—had Eaton rather than HK contracted with IBP—Eaton might have insisted on terms that would have protected itself from liability if it could not perform up to IBP's expectation. It had no opportunity to do this. That became HK's opportunity, and it muffed it.

The judge's allocation of responsibility was in accordance with the principle, which we expounded in a recent case also governed by Wisconsin law, though the case involved a contract of formal insurance ra-

ther than an indemnification clause in an ordinary commercial contract, that without express language an indemnitor will not be found to have agreed to indemnify an indemnitee against the consequences of the breach of a contract that the latter signs *after* the indemnity contract or the formal insurance contract goes into effect. We explained that "insurance policies are presumed not to insure against liability for breach of contract. The reason is the severe 'moral hazard' problem to which such insurance would often give rise. The term refers to the incentive that insurance can create to commit the act insured against, since the cost is shifted to the insurance company . . . . [S]uppose, having somehow persuaded an insurance company to insure against liability for breach of contract, you hire a contractor to build an extension on your house and after he has completed his work you refuse to pay him, and, when he sues, you turn his claim over to the insurance company." *Krueger Int'l, Inc. v. Royal Indemnity Co.*, 481 F.3d 993, 996 (7th Cir. 2007); *see also Farmers Automobile Ins. Ass'n v. St. Paul Mercury Ins. Co.*, 482 F.3d 976, 978 (7th Cir. 2007).

This case is the same; HK signed the contract with IBP after Eaton had promised to indemnify HK. And the Wisconsin courts have extended from formal insurance contracts to indemnification clauses the principle that indemnification is presumed not to extend to the consequences of activity that is in the control of the party seeking indemnification. *Dykstra v. Arthur G. McKee & Co.*, 301 N.W.2d 201, 204 (Wis. 1981); *Hortman v. Otis Erecting Co.*, 322 N.W.2d 482, 486 (Wis. App. 1982); *Foskett v. Great Wolf Resorts, Inc.*, 518 F.3d 518, 524 (7th Cir. 2008) (Wisconsin law). Thinking that it would be indemnified for any losses on its contract with IBP, HK had a diminished

incentive to try to minimize its potential liability for such losses in negotiating the terms of the contract.

HK actually *wants* us to treat Eaton just like an insurance company. It complains that when it (in effect) tendered the defense of IBP's suit to Eaton by notifying Eaton of the suit and offering it an opportunity to participate, Eaton refused the tender. But that could matter only if Eaton were contending that HK should not have settled IBP's suit for the amount it did, or otherwise complaining about not having controlled the litigation. Instead it is contending that the indemnification clause was inapplicable to losses based on a suit that arose from a contract made after the clause took effect. Even insurance companies as we said don't insure against breaches of contract, because if they did people would break their contracts with impunity. HK's claim is even weaker because it wants us to rule that Eaton insured it against liability for breach of a contract that hadn't been made yet. For all we know, had Eaton-Kenway not been sold to HK the contract between Eaton-Kenway/Alvey and IBP would have looked completely different from the contract that HK negotiated.

HK argues that "no prudent business relies on an indemnity to avoid meeting its business commitments." True; but armed with an indemnity, a business will take risks that it would not take had it to bear the entire cost of its mistakes. HK could promise IBP more than it was certain that it could deliver because the indemnity cushioned it (it thought) against the full consequences of being unable to honor its promise. HK unguardedly acknowledged as much in its opening brief in this court when it said that "the broad indemnity by Eaton was a substitute for the assessment of risks" by HK.

Remember that the letter of intent that IBP sent Eaton before the sale of Eaton-Kenway was only two sentences long; the only term in it was the price term. HK does not claim that it was an enforceable contract; it was not. *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 814 (7th Cir. 1987) (Wisconsin law). HK itself is emphatic that the enforceability of the letter of intent is "irrelevant." In the unlikely event that it were deemed enforceable, it would be enforceable only as a contract to continue negotiating, *e.g.*, *Venture Associates Corp. v. Zenith Data Systems Corp.*, 96 F.3d 275, 276-80 (7th Cir. 1996), because it did not specify Eaton's performance.

We can imagine a jury's being told to allocate responsibility for the loss to HK between Eaton—for its alleged misrepresentations to IBP regarding the speed of the material-handling system—and HK for failing either to verify the capabilities of its newly acquired division or to negotiate a contract that would minimize its liability in the event that the system did not meet IBP's high expectations. Any such division of fault would be likely to be arbitrary, especially given the mirror-image indemnification clause that would entitle Eaton to complain that HK's signing of the contract that gave rise to the suit and settlement triggered that clause, creating an endless cross-indemnity loop. HK had the last clear chance to avoid or limit liability, and it should not be allowed to shift that liability to its predecessor. In any event, HK did not ask the jury to make such an allocation. It wagered double or nothing. It gets nothing.

This is not to say that HK would have no possible remedy against misrepresentations by Eaton. Suppose Eaton had grossly exaggerated the value of Eaton-Kenway to HK, and HK had all unknowingly ob-

tained loans that it could not repay because it had depleted its assets in buying what turned out to be a worthless company. In a suit by lenders against HK, HK would be entitled to indemnity from Eaton both under the buyer's indemnification clause and as a matter of general tort principles of indemnity because Eaton would have been the active tortfeasor. *Jones v. General Casualty Co.*, 582 N.W.2d 110, 112 (Wis. App. 1998); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. First National Bank*, 774 F.2d 909, 916-19 (8th Cir. 1985); *White v. Johns-Manville Corp.*, 662 F.2d 243, 249-50 (4th Cir. 1981). If, moreover, Eaton was guilty of misrepresentations (or misleading omissions) so well concealed that no amount of care by HK in negotiating with IBP could have detected them, and no duty of prudence required HK to insist on terms in its contract with IBP that would have prevented IBP from suing for breach of contract, HK could have sued Eaton for fraud, and issues of indemnification would have fallen by the wayside. What HK could not do was treat Eaton's contractual duty of indemnification as insuring HK against the consequences of signing a contract that exposed it to a suit for breach of that contract.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 02-C-1103

HK SYSTEMS, INC.,
Plaintiff,

v.

EATON CORPORATION,
Defendant.

DECISION AND ORDER

Plaintiff HK Systems, Inc. ("HK") brought this diversity action against defendant Eaton Corporation ("Eaton"), alleging that Eaton breached a contractual duty to indemnify. After addressing a number of motions, I conducted a jury trial and the jury found for HK. Before me now are Eaton's motions for reconsideration of my decision denying its summary judgment motion and for judgment as a matter of law.[1]

I. INTRODUCTION

HK based its suit on an indemnification provision included in a 1995 asset purchase agreement ("APA")

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[1] HK has also brought a motion for sanctions and a motion to file a surreply in opposition to Eaton's motion for judgment as a matter of law. I will deny HK's motion for sanctions and grant its motion to file a surreply without further discussion.

between it and Eaton. The provision obligated Eaton to indemnify HK for any loss resulting from conduct of Eaton or Eaton-Kenway, an Eaton subsidiary. In 1998, a third party, Iowa Beef Producers, Inc. ("IBP"), sued HK. Ultimately HK settled the case for about $3 million, and it incurred about $6.6 million in fees and costs defending the suit. HK sought indemnification from Eaton for some portion of its loss, arguing that IBP's suit was based in part on Eaton-Kenway's conduct, and Eaton contested HK's indemnification claim.

In the days leading up to the trial, I began to suspect that in my pretrial rulings I had incorrectly and/or inadequately interpreted the indemnification provision. During the trial these suspicions increased. I have since examined the parties' post-trial submissions and the trial record and re-examined the parties' earlier submissions, and my suspicion has become a conviction. I now conclude that I improperly interpreted the indemnification provision of the APA insofar as it relates to causation. I regret that the parties have had to spend time and money because of this error, but I am obliged to attempt to get the matter right. I am authorized to do so because prejudgment decisions are subject to revision before the entry of final judgment. Fed. R. Civ. P. 54(b). And while I am reluctant to reopen issues once decided, I may do so where, as here, I incompletely and/or incorrectly resolved them. *Aqostini v. Felton,* 521 U.S. 203, 236 (1997).[2] As I will discuss, I should have resolved most of the issues on summary judgment. However, several issues remain and at least one of them may require a new trial.

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[2] I will discuss this point in more detail when I address the law of the case doctrine.

II. BACKGROUND FACTS

In 1994, Eaton-Kenway responded to a request for a proposal from IBP to construct an automated material handling system ("AMHS") for IBP's beef processing plant in Dakota City, Nebraska. Eaton-Kenway was a "system integrator," i.e., an integrator of hardware and software for complex industrial systems. Eaton-Kenway partnered with Alvey Corporation ("Alvey") in responding to IBP's request. Under the Eaton-Kenway proposal, Alvey would create the conveyor system and Eaton-Kenway would design the software and integrate it with the conveyor system. In December 1994, IBP advised Eaton-Kenway that it had selected the Eaton-Kenway/Alvey bid, at a price not to exceed $14,300,000. The parties continued to negotiate the design of the AMHS. IBP represented that it would only contract with Eaton-Kenway and Alvey if their system could meet a particular "throughput," a term describing a system's capacity to move boxes in a given period of time. IBP stated that the inbound throughput requirement was 3,816 cases per hour and the outbound 3,197 cases per hour. In a January 11, 1995 letter to IBP, an Eaton-Kenway agent represented that the AMHS would "meet or exceed" these throughput needs. (Compl. Ex. D at 2.)

While Eaton-Kenway and IBP negotiated, Harnischfeger, HK's predecessor and a competitor of Eaton-Kenway in the system integration business, negotiated with Eaton and Eaton-Kenway for the purchase of certain of Eaton-Kenway's assets. On January 12, 1995, these three companies entered into the APA pursuant to which Harnischfeger would purchase property from Eaton-Kenway as well as Eaton-Kenway's rights in connection with certain

projects—including the IBP project. The APA contained the indemnification provision presently at issue. After signing the APA, Harnischfeger examined Eaton and Eaton-Kenway's financial records and reviewed the status of their ongoing projects. In February 1995, the companies closed the transaction. Subsequently, Harnischfeger changed its name to HK Systems, Inc.

HK took over Eaton-Kenway's negotiations with IBP. On March 23, 1995, HK entered into a contract with IBP for the construction of the AMHS under terms similar to those that Eaton-Kenway, Alvey and IBP had contemplated but not finalized. However, there were notable differences. The contract specified throughput numbers very similar to those that Eaton and IBP had contemplated, but stated that they were a "maximum." In addition, the HK/IBP contract changed the relationship between HK, Alvey and IBP. Whereas IBP had previously planned to enter into contracts with both Eaton-Kenway and Alvey, at HK's request, IBP agreed to contract with HK for the complete system and allow HK to subcontract with Alvey for the conveyor portion of the system. HK and Alvey then went about manufacturing and installing the AMHS for the Dakota City plant. Throughout the process, HK worked with IBP to alter and refine the design specifications of the system.

HK and Alvey failed to meet deadlines and throughput expectations. HK and IBP tried to work out their problems, but ultimately the relationship broke down. IBP then contracted with a third party to bring the system up to its specifications and sued HK in Nebraska.[3] IBP asserted seven claims:

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[3] HK removed the case to federal court. I will hereinafter refer to such court as the "Nebraska court."

(1) breach of the March 23, 1995 contract; (2) breach of express warranty; (3) breach of implied warranty of fitness; (4) breach of implied warranty of merchantability; (5) negligent misrepresentation; (6) fraud in the inducement; and (7) violation of the Nebraska Deceptive Trade Practices Act ("DTPA"). HK brought four counterclaims, including a claim for $128,148.39 in unpaid receipts. HK viewed some of IBP's claims as related to Eaton-Kenway's pre-contractual statements regarding throughput and requested Eaton's assistance in defending the suit. Eaton declined HK's request.

During the course of the IBP litigation, HK successfully moved for summary judgment on the fraud-in-the-inducement claim and successfully moved to exclude evidence that the contract called for anything other than a maximum throughput rate. As discussed, HK and IBP ultimately settled the remaining claims and counterclaims, and after Eaton declined HK's request for indemnification, HK commenced the present action.

III. PROCEDURAL HISTORY

A. Pre-Trial Motions

In December 2002, Eaton filed a motion to dismiss, arguing that IBP's claims against HK arose out of HK's conduct rather than its own and accordingly did not trigger a duty to indemnify. HK responded that while certain of IBP's claims looked to its conduct, others looked in part to Eaton-Kenway's conduct and that it needed discovery to determine which claims fell into the latter category. In May 2003, I denied Eaton's motion. Later in 2003, on HK's motion, I attempted to construe APA Article 10.1, the indemnification provision. After determining that Wisconsin

law governed the APA, I stated that Article 3, in which HK agreed to assume Eaton-Kenway's pre-closing liabilities related to the projects being sold, appeared to contradict Article 10.1, and to the extent that it did, Article 10.1 was ambiguous.

In 2005, the parties filed dispositive motions. Eaton moved for summary judgment, arguing that it had no obligation to indemnify HK for losses arising out of any of IBP's claims. Eaton contended that it could not be held responsible for IBP's contract-based claims because Eaton-Kenway had not contracted with IBP. It also argued that judicial estoppel precluded HK from asserting that Eaton-Kenway's statements to IBP constituted fraud in the inducement. Finally, Eaton argued that the Nebraska DTPA authorized only prospective injunctive relief and therefore could not implicate Eaton-Kenway's actions. HK filed a motion for partial summary judgment, arguing that some portion of IBP's case related to Eaton-Kenway's conduct and asking for a trial on damages.

In my February 9, 2006 summary judgment decision, I resolved the ambiguity identified in my 2003 decision and found that Article 10.1 applied to HK's claim against Eaton. I further found that Article 10.1 did not limit Eaton's indemnification obligation to claims arising out of a contract and that judicial estoppel was inapplicable. I then granted HK's motion for partial summary judgment, stating that except for the negligent misrepresentation claim (which involved HK's statements to IBP regarding the AMHS completion date), IBP's claims resulted at least in part from Eaton-Kenway's conduct. I based this conclusion on the fact that the IBP complaint mentioned Eaton-Kenway's statements, that IBP had

attempted (generally unsuccessfully) to present such statements to the Nebraska court, and that HK had presented evidence that Eaton contributed to the design of the AMHS prior to selling the project to HK.

Eaton filed a motion for reconsideration, and on May 24, 2006, I reversed my grant of partial summary judgment and modified the decision. I clarified that Eaton only had to indemnify HK to the extent that HK suffered losses covered by Article 10.1. I then discussed Article 10.1's causation element, as Eaton's motion for reconsideration emphasized that HK had failed to present evidence that Eaton caused its losses. However, I found that the APA's indemnification provision was broad, that a jury could infer that Eaton-Kenway's conduct caused HK's losses and that a trial was required.

B. Trial

On September 11, 2006, the case went to trial. At the close of HK's case in chief, both parties moved for judgment as a matter of law, and I reserved decision on the motions. At the close of Eaton's case, the parties renewed their motions, and I again reserved decision.[4] The jury then awarded HK $3,128,148.39,

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[4] In reserving decision, I cited the following language from the Commentary to Federal Rule of Civil Procedure 50:

> [o]ften it appears to the court . . . that a motion for judgment as a matter of law made at the close of the evidence should be reserved for a post-verdict decision. This is so because a jury verdict for the moving party moots the issue and because a preverdict ruling gambles that a reversal may result in a new trial that might have been avoided. For these reasons, the court may often wisely decline to rule on a motion for judgment as a matter of law made at the close of evidence.

which represented the total amount that HK paid to IBP along with the unpaid receipts that HK forgave IBP, in settlement of IBP's claims.

IV. INDEMNIFICATION PROVISION

A. Previous Discussion of Causation

HK has always contended that some portion of its IBP litigation losses resulted from Eaton-Kenway's pre-closing statements to IBP that it would meet IBP's throughput requirements. HK has further contended that "resulting from" is synonymous with "arising out of and that Article 10.1 required Eaton to indemnify it for loss due to any claim of IBP's that would not or could not have been brought "but for" Eaton-Kenway's statements. (Pl.'s Br. in Opp'n to Mot. to Dismiss at 17.) In the early stages of the case, HK appeared to concede that IBP's breach of contract, negligent misrepresentation, and breach of implied warranty of merchantability claims did not result from Eaton-Kenway's conduct. (See Pl.'s Br. in Supp. of Mot. for Order Construing Asset Purchase Agreement at 1; *see also* Pl.'s Br. in Opp'n of Mot. to Dismiss at 21.) Citing to IBP's references to Eaton-Kenway's statements in its complaint, HK argued that only IBP's remaining claims resulted, in part, from Eaton-Kenway's conduct. (*See* Pl.'s Br. in Supp. of Mot. for Order Construing Asset Purchase Agreement at 1.) In summary judgment briefing, HK did not analyze each IBP claim individually but more generally argued that some portion of its losses resulted from Eaton-Kenway's statements. (*See generally* Pl.'s Br. & Proposed Findings of Fact in Supp. of Mot. for Partial Summ. J.) Eaton countered that no IBP claim could be said to have resulted from Eaton-Kenway's conduct unless such conduct *and not HK's conduct* provided the basis for the claim.

In the February 9, 2006 summary judgment decision, I stated that with the exception of IBP's negligent misrepresentation claim, each of IBP's claims was "based at least in part on" Eaton's conduct and noted IBP's attempt to admit in evidence Eaton-Kenway's pre-closing statements. (Feb. 9, 2006 Decision & Order at 7.) Unfortunately, in this perfunctory discussion, I failed to illuminate the meaning of "resulting from." In the May 24, 2006 decision on Eaton's motion for reconsideration, I discussed causation in greater detail, stating that the indemnification provision:

> requires Eaton to indemnify HK for losses wholly or partially "resulting from" Eaton's acts or omissions. The phrase, "resulting from," is synonymous with "arising out of," see Lee R. Russ & Thomas F. Segalia, 7 *Couch on Insurance* 3d § 101:54 (3d ed. 2005) (collecting cases), and "arising out of" means "originating from, growing out of, or flowing from, and requir[es] only that there be some causal relationship between the injury and the risk for which coverage is provided." *Lawyer v. Boling*, 71 Wis. 2d 408, 415 (1976). Thus, to prevail on its indemnification claim, HK must establish that Eaton's conduct wholly or partially caused its losses.

(May 24, 2006 Decision & Order at 6-7.) Based on this broad reading, I stated that HK could prove that its losses resulted from Eaton-Kenway's pre-contractual statements to IBP by satisfying a jury that IBP's claims were supported by such statements, that "the primary reason that IBP was dissatisfied with the AMHS" was that the system had failed to live up to Eaton-Kenway's promises and that Eaton-Kenway had "designed critical components of the system"

before HK bought the right to build such system (*Id.* at 7.) The May 24 decision did not explicitly accept HK's argument in favor of "but for" causation, but the decision adopted a meaning of causation at least as broad.

B. Present Interpretation of "Resulting From"

Some first principles of contract interpretation are in order. Interpretation of a contract is a question of law for the court. *Yauger v. Skiing Enters., Inc.*, 206 Wis. 2d 76, 80 (1996). The aim of contract interpretation is to ascertain the intent of the parties. *DeWitt Ross & Stevens, S.C. v. Galaxy Gaming & Racing Ltd. P'ship*, 273 Wis. 2d 577, 597 (2004). Courts must attempt to interpret contracts to give reasonable meaning to each provision without rendering any superfluous. *Id.* They must also avoid any interpretation of a contract that could lead to an absurd result. *Kabes v. Sch. Dist.*, 270 Wis. 2d 502, 510 (Ct. App. 2004). A contract must be construed as a whole. *Pleasure Time v. Kuss*, 78 Wis. 2d 373, 379 (1977).

Specific rules govern the interpretation of indemnification agreements. A party may agree to indemnify another against liability for its own conduct and the indemnitee's conduct. *Barrons v. J.H. Findorff & Sons*, 89 Wis. 2d 444, 452 (1979). Insofar as an indemnitor agrees to cover legal claims based on its own acts, an indemnification agreement should be construed broadly, but insofar as the agreement requires indemnification for the indemnitee's acts, it should be construed strictly. *Id.* In the absence of clear and unequivocal language, an indemnification agreement should not be construed to require indemnification for conditions or operations not under the control of the indemnitor. *Hortman v. Otis Erecting Co.*, 108 Wis. 2d 456, 464 (Ct. App. 1982).

Article 10 of the APA controls indemnification between HK and Eaton, and contains two relevant sections. Article 10.1 specifies when Eaton must indemnify HK, and Article 10.2 specifies when HK must indemnify Eaton. The sections read as follows:

> 10.1 *Indemnification of the Buyer.* Each of [Eaton-Kenway] and Eaton, jointly and severally shall indemnify [HK][5] and its officers, directors and shareholders (collectively, the "Buyer Indemnified Parties") and hold each of the Buyer Indemnified Parties harmless from and against any and all damages, losses, deficiencies, actions, demands, judgments, costs and expenses (including attorneys' and accountants' fees) of or against any of the Buyer Indemnified Parties resulting from (i) any misrepresentation or breach of warranty hereunder on the part of [Eaton-Kenway] or Eaton, (ii) any nonfulfillment of any agreement or covenant contained herein . . . on the part of [Eaton-Kenway] or Eaton . . . and (iii) any act or omission of [Eaton-Kenway] or Eaton or any occurrence of a matter with respect to the Subject Assets or the Subject Business relating to or arising out of the period on or before the Closing Date, including without limitation, any claim related to any work performed by [Eaton-Kenway] under the Coke Agreement or any of the other Projects, any other claim for nonperformance or breach of contract, any claim for worker's compensation or unemployment compensation, and/or any claim for personal injury or property damage.

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[5] I have substituted "HK" for "Seller" in this block quote, though HK was still called Harnischfeger at the date of contract.

> 10.2 *Indemnification of the Seller.* [HK] shall indemnify [Eaton-Kenway] and Eaton and their respective officers and directors (collectively, the "Seller Indemnified Parties") and hold each of the Seller Indemnified Parties harmless from and against any and all damages, losses, deficiencies, actions, demands, judgments, costs and expenses (including attorneys' and accountants' fees) of or against any of the Seller Indemnified Parties resulting from (i) any misrepresentation or breach of warranty hereunder on the part of [HK], (ii) any nonfulfillment of any agreement or covenant contained herein . . . on the part of [HK], and (iii) any act or omission of [HK] or any occurrence of a matter with respect to the Subject Assets or the Subject Business relating to or arising out of the period after the Closing Date, including without limitation, any claim for nonperformance or breach of contract, any claim for worker's compensation or unemployment compensation, and/or any claim for personal injury or property damage.

(Compl. Ex. E at 57.)

Articles 10.1 and 10.2 define those situations in which each party to the APA is required to indemnify the other. Read together, the articles are an attempt to create a workable system for determining which entity would be responsible for expenses arising out of legal claims regarding the assets Eaton-Kenway transferred to HK.[6] In both articles, subsections (i) and

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[6] As discussed, I previously stated that Article 10.1 was ambiguous to the extent that Article 3 seemed to contradict it, (Dec. 17, 2003 Mem. at 7), and in the summary judgment decision, I addressed the contradiction. (Feb. 6, 2006 Decision & Order at 6). I have never found Article 10.1 to be ambiguous in itself.

(ii) govern legal claims between HK and Eaton or Eaton-Kenway arising out of the APA, and subsection (iii) governs claims against HK, Eaton or Eaton-Kenway brought by third parties.[7] Article 10.1(iii) provides that Eaton will indemnify HK for any loss regarding the assets sold resulting from (a) any pre-closing act of Eaton; (b) any pre-closing omission of Eaton; or (c) any pre-closing occurrence. Article 10.2 provides that HK will indemnify Eaton for any loss regarding the assets sold resulting from: (a) any post-closing act of HK; (b) any post-closing omission of HK; or (c) any post-closing occurrence.

I previously stated that Article 10.2 "has no bearing on Eaton's obligation to indemnify HK for losses resulting from Eaton's own pre-closing conduct." (Dec. 17, 2003 Decision & Order.) This is literally true; Article 10.2 covers situations in which Eaton is entitled to indemnification by HK. Nevertheless, in determining the meaning of the causation language, Article 10.2 is helpful. Because Articles 10.1 and 10.2 are mirror provisions, "resulting from" must have the same meaning in each provision. And if, as HK contended and in substance I previously found, one party's loss must be indemnified if it would not have occurred "but for" some action of the other, no matter how remote the action from the loss and no matter what intervening events occurred, Articles 10.1 and

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[7] Subsection (iii) does not explicitly refer to "third-party legal claims," but the examples it gives as to how a pre-closing act, omission or occurrence could lead to a loss are all third-party legal claims. See *United States v. Sec. Mgmt. Co.*, 96 F.3d 260, 265 (7th Cir. 1996) (stating that under Wisconsin's ejusdem generis rule, "where a general term . . . is preceded or followed by a series of specific terms, the general term is viewed as being limited to items of the same type or nature as those specifically enumerated").

10.2 would swallow one another and lead to absurd results. Each indemnification provision would be so inclusive that the parties would have to indemnify each other for virtually any loss arising from a claim relating to any asset transferred by Eaton to HK. The following examples illustrate this.

First, imagine that just prior to Eaton-Kenway's transfer of property to HK, an Eaton-Kenway employee spilled some oil on a workroom floor. Imagine further that after the purchase, HK employees noticed the spill but failed to clean it up. A month later, a third party slipped and fell on the spill, injuring himself. As I previously defined causation, if the third party sued HK for negligence, HK could likely require Eaton to indemnify it for its entire loss under Article 10.1. This is so because Eaton-Kenway originally spilled the oil and but for such act, the third party would not have sued HK. And if the third party sued Eaton-Kenway, Eaton-Kenway could likely require HK to indemnify it for its entire loss under Article 10.2 because the third party would not have sued Eaton-Kenway but for the fact that HK negligently ignored the spill.

Second, imagine that just prior to Eaton-Kenway's transfer of assets to HK, Eaton-Kenway hired a new employee, and immediately after the transfer, HK fired her. If the employee sued HK for wrongful termination, HK could likely require Eaton to indemnify it for its entire loss under Article 10.1 because but for Eaton's hiring the employee, HK would not have been sued. And if the terminated employee sued Eaton-Kenway, Eaton-Kenway could likely require HK to indemnify it under Article 10.2 because but for HK's firing, Eaton-Kenway would not have been sued.

Finally, imagine that just prior to Eaton-Kenway's transfer of assets to HK, Eaton-Kenway contracted with a third party to build an AMHS, and after the transfer, HK performed the work required by the contract. Further, imagine that the third party was dissatisfied with HK's work and sued HK. HK could likely require Eaton to fully indemnify it under Article 10.1 because the third party would not have brought the action but for the fact that it contracted with Eaton-Kenway. However, if the third party sued Eaton-Kenway, Eaton-Kenway could likely obtain full indemnification from HK because but for HK's unsatisfactory work, Eaton-Kenway would not have been sued.

Each of the above hypotheticals are conceivable under my previous interpretation of "resulting from." And the result of each is absurd, as it would make no sense for both parties to a contract to each agree to indemnify the other for the same losses. Rather than providing a workable system for determining responsibility to pay legal expenses, the contract would lead to confusion and endless litigation. Thus, my previous definition of causation was clearly wrong. *See Kabes,* 270 Wis. 2d at 510 (stating that courts should avoid interpretations of contracts that lead to absurd results).

In determining how a loss could be said to result from an act or omission of Eaton or Eaton-Kenway in connection with a third-party legal claim, I made two clear errors. First, I incorrectly analyzed how directly the act or omission must relate to the claim. And second, I incorrectly analyzed how the merits of the claim affects whether the loss arising from the claim resulted from the act or omission.

As to the directness issue, in order to harmonize Article 10.1 with Article 10.2, I now read Article 10.1(iii) as requiring Eaton to indemnify HK only where Eaton or Eaton-Kenway's act or omission (or a pre-closing occurrence) directly gives rise to a claim against HK. This is not to say that the claim must have fully accrued during Eaton's tenure. In contrast to Article 3, Article 10 does not refer to accrual. Thus, if Eaton-Kenway breached a contract prior to the closing date, a breach of contract action claiming consequential damages would be based on Eaton-Kenway's act even if the claimant did not incur damages until after the closing date. However, under Article 10.1, the claim must be based on Eaton-Kenway's act or omission or on a pre-closing occurrence.

Thus, if a significant intervening and superceding event separated the act, omission or occurrence from the claim, a loss ensuing from the claim could not be fairly said to result from the claim. This common sense notion not only reflects the language and structure of the agreement but is consistent with contract law, *Smith v. Katz,* 226 Wis. 2d 798, 824 (1999) (stating that there is no causal nexus between an early "cause" and an injury for the purpose of an indemnification contract where the "cause [has been] interrupted or replaced by another cause"); with tort law, *Fandrey v. Am. Family Mut. Ins. Co.,* 2004 WI 62, ¶ n.12 (2004) (discussing the effect of remoteness of an allegedly negligent act from an injury), and even with criminal law, *State v. Ellefson,* No. 84-2472, 1986 Wisc. App. LEXIS, at *8-17 (Wis. Ct.App. Feb. 20, 1986) (explaining the intervening cause defense to a drunk driving

charge).[8] Thus, while the hypothetical breach of contract action described above certainly would never have been brought but for Eaton-Kenway's having entered into a contract, HK's conduct allegedly breaching the contract would constitute an intervening and superceding cause. *See Scottsdale Ins. Co. v. Subscription Plus, Inc.*, 299 F.3d 618, 621 (7th Cir. 2002) (discussing Wisconsin law regarding superceding events and citing *Leposki v. Ry. Express Agency, Inc.*, 297 F.2d 849, 849-51 (3d Cir. 1962) for the proposition that where a person spills gasoline, and a second person drops a match on such gasoline, the dropping of the match breaks the causal chain between the spill and the resulting fire).

Of course, this is not to say that a loss cannot have two independent causes—one being Eaton-Kenway's conduct and the other being HK's conduct—leading to an obligation of Eaton to cover that portion of the loss caused by its own conduct. For example, if a plaintiff sued HK for fraud and claimed that Eaton-Kenway made a fraudulent misrepresentation prior to transferring its assets to HK, and HK made another fraudulent misrepresentation after the transfer, HK could obtain indemnification for that portion of its loss caused by Eaton-Kenway's fraud but not for the remaining portion. But there is a critical difference between a duty to indemnify for a portion of a loss produced by several causes and a duty to indemnify

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[8] I rely on the cited cases only insofar as they help me understand the parties' intent. In part, my earlier missteps resulted from placing too much weight on the definition of "resulting from" in certain insurance cases, rather than focusing on the definition contemplated by HK, Eaton and Eaton-Kenway when they entered the contract. (*See* May 24, 2006 Decision & Order at 6-7 (citing *Lawyer v. Boling*, 71 Wis. 2d 408 (1975)).)

for a loss separated from Eaton-Kenway's conduct by a significant superceding event. *See* 7 *Couch on Insurance* 3d § 101:47 (2005).

So interpreted, Articles 10.1 and 10.2 compliment rather than contradict one another, as any particular claim in a lawsuit will be based either on Eaton-Kenway's act or omission, or a pre-closing occurrence, or on HK's act or omission, or a post-closing occurrence.[9] Further, interpreted in this way, the indemnification provisions are consistent with Wisconsin causation law, *see Smith,* 226 Wis. 2d at 824, and with the legal principal that in the absence of clear language, an indemnitor should not have to provide indemnification for a loss over which the indemnitor had no control. *See Hortman,* 108 Wis. 2d at 464. Further, this interpretation leads to a reasonable result. Under HK's "but for" causation, Eaton would have to indemnify HK for virtually any claim related to a transferred asset, given that Eaton-Kenway initiated all of the project assets and thus necessarily engaged in conduct constituting a link in the causal chain leading to any loss. It is highly implausible that sophisticated corporations like HK and Eaton would agree to such indemnification. *See id.* (stating that "if we were to adhere to the trial court's broad construction of the indemnification agreement, the subcontractor's liability would be almost limitless"). Rather, HK, Eaton and Eaton-Kenway agreed that the party actually responsible for the creation of a third-party claim (and thus the party able to prevent such claim from materializing) is responsible for covering losses arising out of such claim.

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[9] Eaton-Kenway and HK did not work on any project at the same time.

I now turn to the effect of the merits of a third-party claim on Eaton's duty to indemnify. I addressed this issue in the February 9 and May 24, 2006 decisions but, again, incompletely and unclearly.[10] In the absence of contract language to the contrary, an indemnification agreement covering losses arising from third-party claims based on the indemnitor's conduct is presumed to apply only when the indemnitee is actually liable for the claim. *Carey Transportation, Inc. v. The Greyhound Corporation,* 80 B.R. 646, 652 (S.D.N.Y. 1987); *see also Barrons,* 89 Wis. 2d at 455-56 (noting that when an indemnitee seeks reimbursement related to a third-party claim that it settled after giving the indemnitor the opportunity to participate in the defense, the indemnitee is relieved of proving that it was actually liable to the third party and most only establish that it was potentially liable.).

There are exceptions to this general rule. Where an indemnitor agrees to assume a duty to defend (such as with insurance contracts), then such duty applies to any allegation that could arguably give rise to covered liability, even if the allegation is meritless or frivolous. *Carey Transp.,* 80 B.R. at 652. In addition, even where an indemnitor does not assume a duty to defend, special rules apply when an indemnitee settles a third-party claim. If the indemnification

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[10] In the February 9 decision, I noted that to obtain indemnification, an indemnitee who settles a claim generally must establish actual liability, but that if before settling, it gave the indemnitor notice of the claim and the indemnitor refused to defend, it need only show potential liability. I found that HK gave Eaton such notice and thus had to establish only potential liability. (Feb. 9, 2006 Decision & Order at 8-10.) In the May 24 decision, I did not revisit the issue but stated that because causation had yet to be determined, the potential liability standard had no application. (May 24, 2006 Decision & Order at 5 n.3.)

agreement covers the settled claim, the settlement is reasonable, and the indemnitee gives the indemnitor reasonable notice of the claim and an opportunity to participate in defending or settling it, the indemnitee is entitled to indemnification of the settlement amount as long as it was potentially liable for the claim. *Deminsky v. Arlington Plastics Mach.*, 259 Wis. 2d 587, 619 (2003); *see also Carey Transp.*, 80 B.R. at 652; *Barrons*, 89 Wis. 2d at 455-56 (following *Parfait v. Jahncke Service*, 484 F.2d 296 (5th Cir. 1973) and *Morrissette v. Sears, Roebuck & Co.*, 322 A.2d 7 (N.H. 1974)); 41 *Am. Jur. 2d Indemnity* § 27 (2005). The rationale underlying this principle is to encourage reasonable settlements but at the same time to protect the indemnitor's right to due process and to prevent an indemnitee from subjecting an indemnitor to a wholly voluntary expenditure. *Parfait*, 484 F.2d at 304-05; *Morrissette*, 322 A.2d at 10-11.

In the present case, the parties have argued that in Article 10 they intended something different from the principles stated above, but they disagree radically as to what they intended. HK argued that Article 10.1 obligates Eaton to indemnify HK for losses based on any third-party claim that alleges liability, regardless of whether HK was actually or potentially or even conceivably liable for such claim. (March 17, 2006 Br. in Opp'n at 4-5.) HK based this argument on the requirement in Article 10.1 that Eaton indemnify HK against "any and all damages, losses, deficiencies, *actions*, demands, judgments, costs and expenses." (*Id.* at 5 (citing Compl. Ex. E at 57) (emphasis added by HK).) However, the quoted language is merely an attempt to identify the situations in which HK might lose money and thus be entitled to seek indemnification. It has nothing to do with the issue of actual ver-

sus potential liability.[11] Eaton argued that it need not indemnify a settled claim unless HK was actually liable for the claim regardless of whether HK sought its help in defending the claim. It based this argument on the language in Article 10.3 authorizing the indemnitee to enforce the agreement "once the amount of the claim is finally determined." (Feb. 24, 2006 Br. in Supp. at 8-9.) However, such language does not address actual versus potential liability. It refers only to what must occur before a party brings a suit for indemnification at all—a third-party claim must be resolved. And the surrounding language appears to clarify that the contract does not intend to contradict the applicable law on this issue. (*See* Compl. Ex. E at 58-59 (referring to the right of the indemnitee to settle and to "pursue each and every remedy available to it at law.")

Thus, I conclude the parties intended that Article 10.1 reflect the principles of contractual indemnification discussed above. These principles make sense. The requirement that the indemnitee establish actual liability for a non-settled claim protects the indemnitor from having to indemnify a totally non-meritorious claim that resulted from a third party's legal miscalculation rather than the indemnitor's conduct. And, as discussed, in the case of a settlement of a claim of which the indemnitor has had notice and an opportunity to participate, the potential liability rule encourages settlements and provides due process for the indemnitor.

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[11] The real issue is not whether HK was involved in an action, but how an action could be said to result from Eaton's conduct, i.e., whether such conduct must create liability.

V. APPLICATION OF INDEMNIFICATION PROVISION TO HK'S LOSS

In my February 9 and May 24, 2006, decisions, I found that a reasonable jury could conclude that Eaton-Kenway and HK had each caused HK's loss and that a jury trial was required to allocate their respective responsibilities. In light of my reinterpretation of Article 10.1, I must reconsider that conclusion and examine each of IBP's claims against HK.

First, I conclude that no reasonable jury could find that IBP's breach of contract and breach of express and implied warranty claims resulted from Eaton-Kenway's conduct. IBP's complaint makes clear that the breach of contract claim is based on the March 23, 1995 contract between IBP and HK. (Compl. Ex. F at 2-4.) With respect to the breach of warranty claims, IBP's allegations, Nebraska law, the decisions of the Nebraska court and the fact that the March 23 contract was an integrated one make clear that such claims also arose solely from the March 23 contract. IBP's allegations indicate that the warranty claim arose from a contract. Further, under Nebraska law, breach of warranty claims necessarily arise from a contract. *See* Neb. Rev. Stat. § 2-313 (regarding express warranty); Neb. Rev. Stat. § 2-314 (regarding implied warranty of merchantability); Neb. Rev. Stat. § 2-315 (regarding implied warranty of fitness for a particular purpose). The decision of the Nebraska court also indicates that the warranty claims arose from a contract. (Oct. 20, 2005 Banerji Decl. Ex. 80 (Neb. Court Decision) at 7-8.) Finally, the March 23 contract between IBP and HK was an integrated one, i.e., it contained the total agreement between HK and IBP. (Def.'s Statement of Uncontested Facts Ex. 63 (March 23 Contract) at 1 (stating that it contract

"shall be the entire agreement between the parties); (Oct. 20, 2005 Banerji Decl. Ex. 80 (Neb. Court Decision) at 7-8 (stating that the March 23 agreement was an integrated contract)). *See also Black's Law Dictionary* 812 (7th ed. 1999) (defining "integrated contract"). As such, each of IBP's warranty claims looked to the March 23 contract and not to any earlier agreements.

The fact that IBP unsuccessfully attempted to introduce evidence of Eaton-Kenway's pre-contractual statements, (*see* Oct. 20, 2005 Banerji Decl. Ex. 80 (Neb. Court Decision) at 7-8), does not change the fact that the claims were based on the March 23 contract. Moreover, as discussed, although HK would not have entered into the March 23 contract but for Eaton-Kenway's pre-contractual negotiations with IBP, these negotiations cannot reasonably be said to have caused IBP's breach of contract or breach of warranty claims. The integrated contract between HK and IBP and HK's partial performance of the contract broke any causal link between any act or omission of Eaton-Kenway, or any pre-closing occurrence, and IBP's contract and warranty claims. *See Katz,* 226 Wis. 2d at 824.

HK has never contended that IBP's negligent misrepresentation claim resulted from Eaton-Kenway's conduct, and it clearly did not.

IBP's fraud in the inducement claim alleged liability based on Eaton-Kenway's conduct. IBP alleged that Eaton-Kenway misrepresented that the AMHS could "meet or exceed" IBP's expectations, although it knew such statement to be false. (Compl. Ex. F at 17.) Nevertheless, HK is not entitled to indemnification for costs associated with it because the Nebraska court found that HK was not actually (or potentially)

liable for such claim and dismissed it.[12] HK has previously suggested that the Nebraska court's dismissal of this claim could have been overturned on appeal, but it has never actually argued that the Nebraska court's decision was wrong and my review of the decision indicates that it was correct. Thus, it is clear that HK was not liable for such claim and Eaton is not obliged to provide indemnification for costs associated with it.

Finally, I turn to I BP's DTPA claim. IBP based this claim on Nebraska's version of the Uniform DTPA, the purpose of which is to deal with "conduct involving either misleading trade identification or false or deceptive advertising." *Indus. Specialty Chems. v. Cummins Engine* Co., 902 F. Supp. 805, 812 (N.D. III. 1995) (internal quote marks omitted). The Nebraska statute prohibits fourteen deceptive sales practices, including representing that "goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have," or "that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another." Neb. Rev. Stat. § 87-302(a)(5) & (7). The statute authorizes persons aggrieved by a prohibited practice to enjoin the seller from continuing to engage in the deceptive practice and in exceptional circumstances to recover attorneys' fees. Neb. Rev. Stat. § 87-303. Further, if the plaintiff establishes that the seller induced it to purchase goods by means of a prohibited practice, any resulting contract is unenforceable and the buyer may retain the goods and refuse to pay for them. Neb. Rev. Stat. § 87-303.07.

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[12] The APA did not create any express duty to defend based on the allegations of a third-party complaint.

In its suit against HK, IBP alleged that HK represented that the AMHS would have "characteristics, uses, and benefits" that it did not have, i.e., reliability, functionality and throughput, and that Eaton-Kenway and/or HK represented that the AMHS would be of "a particular quality and standard," as to its reliability, functionality and throughput. Further, IBP incorporated into the claim all of the pre-contractual and post-contractual statements that it identified elsewhere in the complaint, including some statements made by Eaton-Kenway and others made by HK.[13] (Compl. Ex. F at 19). And the Nebraska court does not appear to have barred the admission of evidence of Eaton-Kenway's pre-contractual statements as to the DTPA claim. (See Oct. 20, 2005 Banerji Decl. Ex. 80 (Nebraska Court Decision) at 7-9.) As such, some of IBP's alleged DTPA violations looked to Eaton-Kenway's conduct and were live at the time of settlement.

In order to prove an entitlement to indemnification for some loss related to the DTPA claim, HK must

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[13] IBP's complaint alleged numerous misrepresentations by HK: that the AMHS would provide a particular throughput; that HK "was capable and experienced in beef handling and that its system was the best designed system for use in the plant"; that HK would meet IBP's specifications; that HK would deliver the system on time; that the AMHS would operate and perform consistently; that the system was fit for IBP's particular use; and that HK's repair methods and procedures and design modifications would remedy all of the problems and defects in the AMHS. (Compl., Docket #1, Ex. F.) IBP's complaint also alleged several misrepresentations by Eaton-Kenway, e.g., that Eaton-Kenway would "meet or exceed" IBP's throughput requirement; that the AMHS would be completed on time; and that Eaton-Kenway and Alvey were leaders in the material handling industry and were dependable. (*Id.*)

make a coverage showing and a liability showing. As to coverage, HK must show that some portion of the settlement looked to that portion of the DTPA claim that arose directly from Eaton-Kenway's conduct. As to liability, HK must show that it faced potential liability for that portion of the DTPA claim that arose directly from Eaton-Kenway's conduct. Although the parties have disputed whether HK "tendered" the defense of the case to Eaton in the sense that it offered to turn over complete control of the case to Eaton, it is clear that HK gave Eaton notice of the IBP suit and of its view that some portion of the suit was indemnifiable and that Eaton had some opportunity to participate in the case. (*See* Feb. 24, 2006 Banerji Decl. Ex. 4 (Letter from Thomas L Stricker, Jr.).) Further, it is undisputed that Eaton unequivocally declined to participate in the case. (*See* Feb. 24, 2006 Banerji Decl. Ex. 5 (Letter from Michael A. Stiegal).) Thus, Eaton had "ample opportunity" to protect its interests but chose not to. *See Deminsky*, 259 Wis. 2d at 618. Finally, HK must establish that its settlement was reasonable.

VI. LAW OF THE CASE

Under the law of the case doctrine, my previous interpretation of Article 10.1 and my application of it to the facts of the present case are presumed correct. *Avitia v. Metro. Club of Chi.*, 49 F.3d 1219, 1227 (7th Cir. 1995). However, the presumption "is not astraightjacket." *Id.*; *see also Castro v. United States*, 540 U.S. 375, 384 (2003) (stating that the law of the case doctrine does not limit judicial power). Ultimately, the doctrine "is a discretionary" one. *Bagola v. Kindt*, 131 F.3d 632, 637 (7th Cir. 1997). A court may revisitits own earlier ruling if it has a strong and reasonable conviction that the ruling was wrong

and if rescinding it would not unduly harm the party that benefitted from it. *Avitia,* 49 F.3d at 1227. As discussed above, I conclude that my previous interpretation of Article 10.1 was wrong, and that as a result, my summary judgment decision was wrong. The question of whether the party benefitting from the decision will suffer harm does not look to whether the substance of the decision will cause harm; it obviously will, given that the party will lose the benefit of an erroneous decision. Rather, it looks to whether the party received notice that the court was considering a reversal, *Fujisawa Pharm. Co. v. Kapoor,* 115 F.3d 1332, 1339(7th Cir. 1997), and had the opportunity to prepare for it, *Prisco v. A&D Carting Corp.,* 168 F.3d 593, 607 (2d Cir. 1999). In the present case, I notified the parties on June 15, 2007 of my intention to reverse myself. Moreover, I will give the parties the opportunity to resolve the remaining issues and to submit their views on the best way to resolve such issues. Thus, this decision creates no "undue harm" problem. *See Avitia,* 49 F.3d at 1227.

VII. CONCLUSION

Therefore,

IT IS ORDERED that plaintiff's motion for sanctions is DENIED.

IT IS FURTHER ORDERED that plaintiffs motion for leave to file a surreply brief is GRANTED.

IT IS FURTHER ORDERED that defendant's motion for reconsideration of my February 6, 2006, summary judgment decision is GRANTED.

IT IS FURTHER ORDERED that the jury's verdict is VACATED.

IT IS FURTHER ORDERED that defendant's motion for judgment as a matter of law is DENIED AS MOOT.

IT IS FURTHER ORDERED that a telephonic status conference is scheduled for

August 2, 2007 at 2:30 p.m. to discuss how to proceed. The court will initiate the call.

FINALLY, IT IS ORDERED that the parties shall notify the court within one week of the status conference which attorneys of record will appear on the call.

Dated at Milwaukee, Wisconsin, this 18 day of June, 2007.

/s/ LYNN ADELMAN
LYNN ADELMAN
District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 02-C-1103

HK SYSTEMS INC.,
Plaintiff,

v.

EATON CORPORATION,
Defendant.

DECISION AND ORDER

HK Systems, Inc. ("HK") brought this diversity action against defendant Eaton Corporation ("Eaton"), alleging that Eaton breached a contractual duty to indemnify it for costs incurred in settling a lawsuit brought by Iowa Beef Producers, Inc. ("IBP"). On June 18, 2007, I set aside a jury verdict in favor of HK and dismissed most of HK's case, holding that I had previously misinterpreted the indemnification agreement and that if I had properly construed it, I would not have permitted most of HK's case to go to a jury. I left open the question of whether the one remaining issue would necessitate another jury trial or should be decided as a matter of law. Before me now are motions relating to my June 18 decision. HK asks me to vacate the decision or alternatively to certify it for interlocutory appeal. Eaton asks me to partially reconsider the decision and to dismiss HK's case in its entirety. I presume familiarity with the facts and with the June 18 decision.

I. HK'S MOTION

HK asks me to vacate my June 18 decision on the ground that I was not authorized to reconsider my summary judgment decision post-trial. It cites language in *Watson v. Amedco Steel, Inc.*, 29 F.3d 274, 277 (7th Cir. 1994), stating that "after trial, whether or not summary judgment should have been granted generally becomes moot." However, *Watson* discusses post-judgment appellate review, and nothing in it suggests that my June 18 interlocutory decision was unauthorized or in any way improper. Moreover, the Seventh Circuit has made clear that even on appellate review, a question of law addressed in a summary judgment decision may be reviewed after a trial. *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 719-20 (7th Cir. 2003); *Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313, 1318 (7th Cir. 1995); *see also Larson v. Benediktsson*, 152 P.3d 1159, 1168 (Alaska 2007) (discussing precedent from the Seventh Circuit and other jurisdictions on this issue). My June 18 decision addressed a question of law—the interpretation of the indemnification agreement. *See Chemetall GMFH*, 320 F.3d at 720 (addressing legal issue of whether district court had properly interpreted a contract). Thus, subject to the law of the case doctrine, it was entirely appropriate for me to correct a previous error of law. *See McKethan v. Tex. Farm Bureau*, 996 F.2d 734, 738, 743 (5th Cir. 1993) (affirming district court's sua sponte post-trial reconsideration of its earlier denial of summary judgment and noting that a trial court is free to reconsider and reverse any of its decisions prior to entering judgment).

HK also argues that I violated the law of the case doctrine because the decision that I reversed was not "dead wrong." (July 31, 2007 Pl.'s Br. in Supp. at 8

(quoting *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988).) However, as I attempted to make clear in my June 18 decision, I believe that my pretrial summary judgment decision was "wrong with the force of a five-week-old, unrefrigerated dead fish." *Sterling Elec.*, 866 F.2d at 233.

HK further argues that it was somehow prejudiced by my June 18 decision. However, the issue which that decision addressed—the meaning of the indemnification agreement—was exhaustively briefed in pretrial motions. And the decision did not rely on new legal or factual material. Also, after I decided to reverse myself, I notified the parties. HK did not ask for an opportunity for briefing or oral argument, and the parties indicated that I should issue the decision and that they would present legal arguments after its release. The crux of HK's prejudice argument is that it was denied the ability to argue its case to the jury under my revised interpretation of the contract. However, as the June 18 decision made clear, under my revised interpretation of the contract, HK had no right to a jury trial on whether the losses associated with most of IBP's claims were indemnifiable because I concluded that such losses were not indemnifiable as a matter of law.

Finally, HK contends that my June 18 decision wrongly concluded that the contract did not require Eaton to indemnify it for losses flowing from IBP's breach of contract, warranty and fraud claims. For the reasons discussed in the June 18 decision, I disagree.

II. EATON'S MOTION

In the June 18 decision, I determined that HK's losses related to most of IBP's legal claims against it were not indemnifiable. However, I found that IBP's claim under Nebraska's Deceptive Trade Practices

Act ("DTPA"), Neb. Rev. Stat. § 87-301 *et. seq.*,[1] appeared indemnifiable to the extent that HK was potentially liable on the claim based on Eaton's conduct, HK could prove loss related to the claim, and HK's settlement of the claim was reasonable. Eaton now asks me to find, as a matter of law, that HK faced no potential DTPA liability. To determine whether HK faced such liability, I must construe the DTPA as would the Supreme Court of Nebraska. *See Brownsburg Area Patrons Affecting Change v. Baldwin,* 137 F.3d 503, 507 (7th Cir. 1998). I have examined the DTPA and materials pertaining to it and now agree with Eaton that HK never faced potential liability under that statute. First, it is highly improbable that Nebraska's supreme court would construe the DTPA such that it would even apply to commercial transactions of the type at issue in the IBP/HK action. Further, even if that court would find that the DTPA applies to such a transaction, IBP's complaint simply did not state a claim under the statute.

As to the applicability of the DTPA, the unicameral Nebraska legislature enacted the statute to protect ordinary consumers and business competitors from deceptive business practices. In other words, it sought to prevent businesses from making statements that could dupe consumers and thereby harm such consumers and take business away from legitimate competitors. The original act, passed in 1969, was modeled on the uniform act, which was designed

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[1] Although Nebraska courts refer to the statute as the "Uniform Deceptive Trade Practices Act" or "UDTPA" based on the uniform law upon which it was modeled, the Nebraska statute differs considerably from the uniform law. Thus, I refer to it as the DTPA.

to protect business competitors from false advertising and trademark-type deceptions. 1969 Neb. Laws 3224; Uniform Deceptive Trade Practices Act Prefatory Note, 7A U.L.A. 273 (1966). The legislature amended the act in 1974 to provide additional protections for consumers. 1974 Neb. Laws 122; Consumer Sales Practices Act: Floor Debate, 83rd Leg. (1974). The amendments gave the state attorney general the authority to prosecute violations of the act, created criminal penalties for violations of the act, prohibited unconscionable contracts, and added that a contract obtained by a violation of the act would be unenforceable. 1974 Neb. Laws 122.

The legislature did not enact the DTPA to regulate transactions between businesses. It had already adopted the Uniform Commercial Code ("UCC") for that purpose. *See* Neb. U.C.C. § 1-103 *et. seq.* The UCC governs how commercial contracts are formed and interpreted, and addresses the remedies for breach of contract and fraud. *See, e.g.*, Neb. U.C.C. § 2-203 (regarding parol evidence); Neb. U.C.C. § 2-204 (regarding contract formation); Neb. U.C.C. § 2-711 (regarding buyer's remedies in general); Neb. U.C.C. § 2-721 (regarding remedy for fraud). The DTPA creates an entirely separate statutory scheme for conduct that—if applicable to business transactions—would abrogate sections of the UCC.[2] No Nebraska

[2] While the UCC bars the consideration of parol evidence that contradicts a contract, *see* § 2-203, the DTPA likely does not, *see* Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC as a Role Model*, 52 Ohio St. L.J. 437, 451-52 (1991). And while the UCC adopts the common law principle that a breach of contract action should put the parties in the position in which they would have been if not for the breach, *see* Neb. U.C.C. § 2-701—2-725, the DTPA appears to endorse placing a buyer in a better position, *see* Neb. Rev. Stat. § 87-303.07.

court has ever applied the DTPA, rather than the UCC, to a case involving a business transaction. Further, courts have found that other states' deceptive trade laws do not govern such transactions. *See, e.g., Golden Needles Knitting & Glove Co. v. Dynamic Mktg. Enters., Inc.*, 766 F. Supp. 421, 430 (D.N.C. 1991); *see generally* Michelle L. Evans, *Who is a "Consumer" Entitled to Protection of State Deceptive Trade Practice and Consumer Protection Acts*, 63 A.L.R.5th 1 (1998). If given the opportunity, I believe that Nebraska's supreme court would rule likewise and would interpret the DTPA as inapplicable to the transaction at issue in IBP's case against HK.

However, even assuming that the state supreme court would find otherwise, IBP nevertheless failed to state a claim for relief under the law. In its complaint, IBP alleged that Eaton violated the DTPA by stating: (1) that it would meet or exceed IBP's throughput requirement; (2) that it would complete the AMHS on time; and (3) that Eaton and its partner, Alvey, were leaders in the industry and dependable. IBP alleged that these statements constituted representations that the AMHS would have "characteristics," "uses" and "benefits" that it did not have and that the AMHS was of a "particular standard" or "quality" that it was not. *See* § 87-302. However, as the Nebraska court noted in the underlying case, the alleged statements "constitute[d] expressions of opinion or sale pitches" rather than statements of fact, *IBP, Inc. v. HK Sys.*, No. 8:98CV480, 2000 U.S. Dist. LEXIS 12272, at *7 (D. Neb. Aug. 15, 2000), and thus the DTPA did not bar them, *see* § 87-302. Eaton's alleged statement that it and Alvey were leaders in the field was mere "puffery," *see Ed Miller & Sons v. Earl*, 502 N.W.2d 444, 453 (Neb. 1993); *Fuentes v. Woodhouse Ford*, No. A-02-1102, 2004 Neb. App.

LEXIS 145, at *23-25 (Neb. Ct. App. June 8, 2004), and the remaining statements were either promises or predictions, not representations of present facts, *see McClure v. Am. Family Mut. Ins. Co.*, 223 F.3d 845, 855 (8th Cir. 2000) (stating that a misrepresentation must refer to a provable fact); *Gerli v. G.K. Hall & Co.*, 851 F.2d 452, 456 (1st Cir. 1988) (stating that a misrepresentation must refer to a past or existing fact); *see also Carlock v. Pillsbury Co.*, 719 F. Supp. 791, 832 (D. Minn 1989) (same).[3]

In addition, Neb. Rev. Stat. § 87-303.07—the section under which IBP sought rescission of the AMHS contract—only refers to representations that induce a buyer to purchase a good or service. To the extent that Eaton's statements differed from the provisions contained in the integrated contract between HK and IBP, no court could reasonably conclude that Eaton's statements induced IBP—a sophisticated corporation represented by counsel—to enter into the contract. *See Parkhill v. Minn. Mutual Life Ins. Co.*, 174 F. Supp. 2d 951, 960 (D. Minn. 2000); *Richardson v. Mast*, 560 N.W.2d 488, 491 (Neb. 1997). And, in fact, the Nebraska court in the underlying case found as much in addressing IBP's fraud claim. *See* IBP, 2000 U.S. Dist. LEXIS 12272, at *7 (stating that the representations were "not statements of material fact upon which IBP has shown that it reasonably relied"). To the extent that the statements mirrored the terms of the contract, IBP's claim did not go to the representa-

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[3] Eaton's statements might be fairly characterized as deceptive if the declarant knew for a fact that Eaton would not honor his representations. However, in the present case, the declarant could not have had such knowledge inasmuch as when he made the statements, Eaton had not yet fully designed the AMHS or begun building or installing it.

tions but rather to the contract itself and is therefore plainly not indemnifiable. Finally, because § 87-303.07 refers to the enforceability of a contract, I question whether the section implicates the Eaton/HK indemnification contract at all, as the claim could only have materialized after HK took actions independent of Eaton's statements, *i.e.*, entered into a contract with IBP.

In sum, IBP's DTPA claim plainly lacked legal merit and thus HK faced no potential liability under the statute. As such, Eaton has no obligation to indemnify HK for any losses related to the IBP litigation. Further, to the extent that a portion of HK's settlement loss was based on IBP's DTPA claim, the settlement was unreasonable. As such, HK's claim for indemnification fails as a matter of law.

III. CONCLUSION

For the reasons stated,

IT IS ORDERED that Eaton's motion for partial reconsideration is GRANTED.

IT IS FURTHER ORDERED that HK's motion to vacate is DENIED.

IT IS FURTHER ORDERED that HK's alternative motion to certify this case for interlocutory appeal is DENIED AS MOOT.

IT IS FURTHER ORDERED that this case be dismissed and judgment be entered in Eaton's favor.

Dated at Milwaukee, Wisconsin, this 12th day of October, 2007.

/s/ Lynn Adelman
LYNN ADELMAN
District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 02C1103

HK SYSTEMS, INC.,
Plaintiff,

v.

EATON CORPORATION,
Defendant.

DECISION AND ORDER

Plaintiff HK Systems, Inc. ("HK") brings this diversity action against defendant Eaton Corporation ("Eaton"), alleging that Eaton breached a contractual obligation to defend, indemnify and hold it harmless for certain liabilities. On February 9, 2006, I granted plaintiff's motion for partial summary judgment on the issue of liability, and Eaton now asks me to reconsider my decision or, alternatively, to certify certain issues for immediate interlocutory appeal.

I. FACTS AND BACKGROUND

In August 1994, Eaton-Kenway, Inc. ("Eaton-Kenway"), a subsidiary of Eaton, responded to a request for a proposal from Iowa Beef Producers, Inc. ("IBP") to construct an automated material handling system ("AMHS") for its beef processing plant in Dakota City, Nebraska. Eaton-Kenway and IBP entered into negotiations and, in December 1994, IBP advised Eaton-Kenway by letter that it would purchase an

AMHS from Eaton-Kenway. IBP and Eaton-Kenway continued to negotiate the AMHS's design and its "throughput" ability, i.e., its capacity to move cartons of beef in a given period of time. On January 11, 1995, R. K. Long of Eaton-Kenway represented to IBP in a letter that the AMHS would "meet or exceed" IBP's expectations with respect to throughput.

While Eaton-Kenway and IBP negotiated concerning the design of the AMHS, Harnischfeger Engineers, Inc. ("Harnischfeger"), which previously competed with Eaton-Kenway, entered into negotiations with Eaton and Eaton-Kenway concerning purchasing some of Eaton-Kenway's assets. On January 12, 1995, Eaton, Eaton-Kenway and Harnischfeger entered into an Asset Purchase Agreement ("Agreement") pursuant to which Harnischfeger purchased Eaton-Kenway's rights in connection with certain projects including the IBP Dakota City project. In February 1995, the parties completed the transaction, and Harnischfeger changed its name to HK Systems, Inc.

In Article 10.1 of the Agreement, Eaton and Eaton-Kenway agreed as follows:

> *Indemnification of the Buyer.* Each of the Seller [i.e., Eaton-Kenway] and Eaton, jointly and severally shall indemnify the Buyer . . . and hold [it] harmless from and against any and all damages, losses, deficiencies, actions, demands, judgments, costs and expenses (including attorneys' and accountants' fees) of or against [the Buyer] resulting from . . . (iii) any act or omission of the Seller or Eaton or any occurrence of a matter with respect to the Subject Assets or the Subject Business relating to or arising out of the period

> on or before the Closing Date, including without limitation, any claim related to any work performed by the Seller under . . . any of the . . . Projects.

On March 23, 1995, HK entered into a contract with IBP pursuant to which it, and its subcontractor, Alvey, Inc., manufactured and installed the AMHS for the Dakota City project. Subsequently, IBP sued HK alleging that the AMHS had failed to satisfy its expectations. IBP asserted claims of: (1) breach of contract; (2) breach of express warranty; (3) breach of implied warranty of fitness; (4) breach of implied warranty of merchantability; (5) negligent misrepresentation; (6) fraud in the inducement; and (7) violation of the Nebraska Uniform Deceptive Trade Practices Act ("UDTPA").

Believing that IBP's claims arose at least in part out of Eaton-Kenway's representations concerning the AMHS, including the Long letter, HK asked Eaton to defend, indemnify and hold it harmless pursuant to Article 10.1 of the Agreement.[1] When Eaton refused, HK defended IBP's suit. It obtained summary judgment on IBP's fraud in the inducement claim and an order excluding Eaton-Kenway's statements made prior to HK's entering into the IBP contract. HK ultimately settled IBP's suit, after which it asked Eaton to indemnify it for a portion of its settlement and defense costs. Eaton refused, and HK commenced the present action.[2]

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[1] The parties agree that Eaton has no duty to indemnify HK for losses resulting from the negligent misrepresentation claim.

[2] I will hereafter refer to Eaton and Eaton-Kenway as "Eaton."

On December 17, 2003, I construed Article 10.1 of the Agreement on which HK based its suit and found the "[t]he unqualified language 'resulting from' contained in Article 10.1 encompasses indemnification for injuries that are either wholly or partially due to the seller's actions. The plain meaning of the cross indemnity provisions in Article 10.1 is that, if one party must indemnify the other party, it must do so to whatever extent covered losses resulted from its acts or omissions." (Mem. at 9, Dec. 17, 2003.) In my February 9 order, I concluded that the claims for which HK sought indemnification were within the scope of the indemnity agreement and that therefore Eaton was obliged to indemnify HK for losses relating to these claims. See *HK Sys, Inc. v. Eaton Corp.*, No. 02C1103, 2006 U.S. Dist. LEXIS 8448 (E.D. Wis. Feb. 9, 2006).

II. STANDARD OF REVIEW

My decision of February 9 did not terminate the action and therefore is "subject to revision at any time." Fed. R. Civ. P. 54(b). Nevertheless, under the law of the case doctrine, courts should be reluctant to reopen issues once decided. *Agostini v. Felton*, 521 U.S. 203, 236 (1997). However, if a court is convinced that it mistakenly decided a question it may revise its decision. *Id.*; *see also Akzo Coatings, Inc. v. Aigner Corp.*, 909 F. Supp. 1154, 1159 (N.D. Ind. 1995) (explaining that whether to reconsider an interlocutory order is within the sound discretion of the district court and that "[u]nlike motions to reconsider final judgments, which are governed by Federal Rules of Civil Procedure 59 or 60, a motion to reconsider an interlocutory order may be entertained and granted as justice requires") (citing *Acme Printing*

Ink Co. v. Menard, Inc., 891 F. Supp. 1289, 1295 (E.D. Wis. 1995)).

III. DISCUSSION

A. Reconsideration

In my February 9 decision, I incorrectly analyzed HK's indemnification claim. In order to prevail on such claim, HK must establish that it suffered an injury that is indemnifiable under the Agreement. *S. Ry. Co. v. Ga. Kraft Co.*, 823 F.2d 478, 480-81 (11th Cir. 1987). Even if an indemnitor refuses to defend an indemnitee, as Eaton refused to defend HK, the indemnitee must still show that its injury is covered by the indemnification agreement.[3] In the present

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[3] This proposition is well settled. *See Royal Ins. Co. of Am. v. Kirksville College of Osteopathic Med., Inc.*, 304 F.3d 804, 807 (8th Cir. 2002) (explaining that even when it has breached a duty to defend, an insurer is still entitled to a trial on the coverage issue); *Henning v. Cont'l Cas. Co.*, 254 F.3d 1291, 1295 (11th Cir. 2001) (noting that an insurer is not estopped from asserting the defense of lack of coverage even if it wrongfully fails to defend); *W. Alliance Ins. Co. v. N. Ins. Co. of New York*, 176 F.3d 825, 831 (5th Cir. 1999) (holding that the facts in record established that underlying claim fell within the policy coverage after noting that the insurer cannot contest the insured's liability after settlement); *Ill. Central Gulf R. Co. v. Intl Paper Co.*, 889 F.2d 536, 540 (5th Cir. 1989) (explaining that in addition to proving it was potentially liable and the settlement was reasonable, plaintiff must show that the parties' indemnity agreement covered plaintiff's loss); *Everett Assocs., Inc. v. Transcon. Ins. Co.*, 159 F. Supp. 2d 1196, 1209-10 (N.D. Cal. 2001) (noting that when the insured settles a claim, the question of whether liability of the insured was one which the contract of insurance covered remains open and may be litigated and determined in an action brought by the insured against the insurer to recover the amount paid in judgment based on improper refusal to defend); *FabArc Steel Supply, Inc. v Composite Constr. Sys. Inc.*, 914 So.2d 344 (Ala. 2005) (explaining that the "potential liability"

case, the Agreement requires Eaton to indemnify HK for losses wholly or partially "resulting from" Eaton's acts or omissions. The phrase, "resulting from," is synonymous with "arising out of," see Lee R. Russ & Thomas F. Segalia, 7 *Couch on Insurance 3d* § 101:54 (3d ed. 2005) (collecting cases), and "arising out of means "originating from, growing out of, or flowing from, and requir[es] only that there be some causal relationship between the injury and the risk for which coverage is provided." *Lawyer v. Boling*, 71 Wis. 2d 408, 415 (1976). Thus, to prevail on its indemnification claim, HK must establish that

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concept is not an issue if the indemnity provisions were not triggered); Restatement (Second) of Judgments § 57 (1982) ("[t]o establish the indemnitor's obligation, two determinations of liability are involved. The first is that of the indemnitee to the injured party, a matter to be resolved by the law governing their relationship (e.g., the law of torts). The second is whether the loss in question is within the terms of the indemnity obligation assumed by the indemnitor"); Restatement (Second) of Judgments § 57, Illustration 2 (explaining that when an indemnitee reasonably settles a claim that the indemnitor has refused to defend, the indemnitor may not argue that the indemnitee did not face liability, but he may litigate whether the loss in question is within the terms of the indemnity obligation assumed by the indemnitor).

In addition, unlike the duty to defend, the duty to indemnify is not triggered by the allegations in the complaint. *Everson v. Lorenz*, 280 Wis. 2d 1, 10-11 (2005). Indeed, requiring an indemnitor to indemnify an indemnitee based on the allegations on the face of the complaint would inappropriately "enlarge the bargained for coverage as a penalty for breach of the duty to defend." *See Servidone Constr. Corp. v. Sec. Ins. Co. of Hartford*, 64 N.Y.2d 419, 445 (Ct. App. N.Y. 1985).

Finally, because HK must establish that its losses are covered by the Agreement, the potential liability standard which I discussed in the February 9 decision has no application.

Eaton's conduct wholly or partially caused its losses. To the extent I previously ruled otherwise, I amend the February 9 order.

Eaton makes several arguments as to why HK cannot establish that Eaton's conduct caused its losses. However, I reject Eaton's arguments and I conclude that a trial is necessary. First, Eaton contends that because some of IBP's claims against HK involved allegations of breach of contract and it did not contract with IBP, HK cannot require it to provide indemnification for losses relating to such claims. However, this argument fails because the fact that Eaton did not contract with IBP is not dispositive of whether its acts or omissions may have contributed to HK's losses. Eaton similarly argues that its conduct could not have caused HK to suffer losses in connection with IBP's UDTPA claim because IBP could not have stated an UDTPA claim against it. This argument also fails because whether IBP could have stated an UDTPA claim against Eaton is not determinative of whether Eaton may have contributed to HK's losses.

Second, Eaton argues that no reasonable factfinder could find that its acts or omissions contributed to HK's losses. However, HK presents evidence on which a reasonable factfinder could base such a finding. For example, Philip McCall declares "[t]he primary reason that IBP was dissatisfied with the AM HS was that, although HK and Alvey believe that the [AMHS] could have performed at the contract throughput rates had it been tested under appropriate conditions, the [AMHS] did not run as fast as the system IBP claims that Eaton had promised IBP when IBP had entered into the letter of

intent in December of 1994, and that R.K. Long had promised to provide in his letter of January 11, 1995." (Decl. of Philip S. McCall in Opp'n to Eaton's Corp.'s Mot. for Summ. J. ("McCall Decl.") ¶26.) Further, HK presents evidence that Eaton contributed to the design of the AMHS by rendering a three-dimensional graphic simulation of the system for IBP, (McCall Decl. Ex. C), designing critical components of the system, including the software operating it, and preparing a drawing of the AMHS as HK ultimately constructed it. (Stricker Dep. June 22, 2005 at 21-22, 25-26, 37-38.) Thus, there is a genuine issue of material fact as to whether Eaton's conduct contributed to HK's losses.

Third, Eaton argues that I mistakenly determined that judicial estoppel does not bar HK from attributing any of its losses to IBP's fraud in the inducement claim because HK prevailed on such claim and succeeded in excluding Eaton's representations regarding the AMHS's capability. The doctrine of judicial estoppel is designed to prevent a party that prevails in a lawsuit from repudiating the ground on which it prevailed in another lawsuit. *Jarrard v. CDI Telecomm., Inc.*, 408 F.3d 905, 914 (7th Cir. 2005). The doctrine applies only when a party takes a position that is clearly inconsistent with a position it previously took, and it prevailed on its earlier position. *Id.* Further, the party must "derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped" and the operative facts must remain the same in both cases. *Id.* at 914-15.

As I stated in my February 9 decision, "HK's position in the present case, that it considered the possibility of IBP appealing the adverse decisions relating

to the fraud in the inducement claim and Eaton's statements in deciding whether to settle, is consistent with the position taken in the IBP litigation, that it was not liable for such claim or such statements." *HK Sys., Inc.*, 2006 U.S. Dist. LEXIS 8448, at *17. Eaton argues that under *Carnegie v. Household International, Inc.*, 376 F.3d 656 (7th Cir. 2004), it is irrelevant that IBP might have appealed. However, *Carnegie* holds only that after losing an appeal, a party is judicially estopped from asserting a position that is inconsistent with its original position. HK did not lose an appeal and, as stated, is not arguing inconsistent positions. Further, HK's conduct has not unfairly disadvantaged Eaton. Fairness is determined "in the context of the defendants' motive in changing positions," *Jarrard*, 408 F.3d at 915, and Eaton does not show that HK acted out of an improper motive. In the IBP litigation, HK had to defend allegations that Eaton misrepresented the capability of the AMHS, and it now contends that it is entitled to indemnification because it suffered losses resulting from Eaton's misrepresentation. This kind of shift, if it is a shift, is common in litigation, and I see nothing improper in it.

Finally, Eaton argues that no reasonable factfinder could conclude that its actions caused losses to HK which are attributable to IBP's fraud in the inducement claim. However, HK presents evidence indicating that IBP relied on Eaton's promises that the AMHS could meet or exceed the throughput rate of 3,197 cases per hour. (*See* McCall Decl. 26.) In a demand letter to HK, IBP's counsel stated that "Eaton, and hence HK, agreed very clearly in a letter dated January 11, 1995 to reaching the throughput

requirements and evidenced their commitment to meet IBP's needs and requirements." (Decl. of Peter Richardson Ex. GG at 2.) Further, in the litigation with HK, IBP cited a list of Eaton's statements on which it relied in contracting with HK. IBP stated that Eaton assured it that the AMHS would meet the "functional requirements as defined in [IBP's] specifications," (*id.* Ex. EE at 2), and that in response to its repeated attempts to confirm that Eaton understood its requirements, R.K. Long "affirmatively represented that the [AMHS] proposal would 'meet or exceed' the throughput requirements, and then included a chart of 'System Throughput Requirements' that does not reflect that the throughput rates are 'maximum rates.'" (*Id.*) Thus, the record contains evidence from which a reasonable jury could infer that HK suffered losses resulting from Eaton's actions in connection with the fraud in the inducement claim.

B. Interlocutory Appeal

Under 28 U.S.C. § 1292(b), a district court may certify an order for interlocutory appeal if it concludes that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." For a court to grant a § 1292(b) petition, "there must be a question of law, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation." *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000). The party seeking interlocutory review has the burden of persuading the court that "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the

entry of final judgment." *Fisons Ltd. v. United States*, 458 F.2d 1241, 1248 (7th Cir. 1972). In the § 1292(b) context, the Seventh Circuit defines the phrase "question of law" as:

> a question of the meaning of a statutory or constitutional provision, regulation or common law doctrine . . . . We also think ... that the question of the meaning of a contract, though technically a question of law when there is no other evidence but the written contract itself, is not what the framers of section 1292(b) had in mind either . . . . We think they used 'question of law' in much the same way a lay person might, as referring to a 'pure' question of law rather than merely to an issue that might be free from a factual contest. The idea was that if a case turned on a pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record, the court should be enabled to do so without having to wait until the end of the case . . . . To summarize, district judges should . . . . remember that 'question of law' means an abstract legal issue . . . .

Ahrenholz, 219 F.3d at 676-77.

Eaton requests that I certify the following questions for interlocutory appeal:

> 1. When an indemnitor exercises its contractual right to decline to defend a third-party claim and when the contract requires indemnification only after there is a determination that the losses resulted from the indemnitor's actions, should an indemnitee that settled a third-party claim be allowed to prevail on a contractual claim for indemnification by showing only that it

was potentially liable to the third party based on the indemnitor's statements or conduct?

2. Should an indemnitee be relieved of its burden to prove liability when an indemnitor declined to prove a defense in underlying third-party litigation if the indemnitor had no duty to defend, and was not given the opportunity to approve a proposed settlement or take over the defense?

3. When an indemnitor has no duty to defend, should a duty to indemnify be imposed without proof that the indemnitor's acts caused the loss incurred by the indemnitee when it defended and settled a third-party claim?

4. Should a duty to indemnify be imposed for losses incurred by an indemnitee in settling a third-party claim alleging fraudulent inducement of a contract when the third party and the indemnitor were never in privity on the contract alleged to be fraudulently induced?

5. Should a duty to indemnify be imposed for losses incurred by an indmenitee in settling a third-party claim alleging breach of contract when the third party and the indemnitor were never in privity on that contract?

6. Should a duty to indemnify be imposed for losses incurred by an indemnitee in settling a third-party claim alleging a violation of the Uniform Deceptive Trade Practices Act when there was no possibility of a future violation of the UDTPA by the indemnitor?

7. Should HK be judicially estopped from arguing that its losses were caused by Eaton

and/or Eaton-Kenway's pre-closing acts when HK successfully argued in the prior IBP litigation that IBP did not rely on any pre-closing representations of Eaton or Eaton-Kenway?

8. Does an indemnitor have the opportunity to "take over the defense" of a third-party claim when the indemnitee refuses to cede control of the litigation and insists it would retain authority to direct the decision-making in the litigation?

(Def. Eaton Corp.'s Mem. of Law in Support of its M. to Reconsider at 13-14.)

In light of my decision on Eaton's motion to reconsider, I conclude that questions (1), (2), (3), and (8) are moot. I will also deny defendant's application with respect to questions (4), (5), and (6) because they involve interpretation of the Agreement and therefore are not "controlling questions of law" as the Seventh Circuit defines the phrase. *See Ahrenholz*, 219 F.3d at 676 (stating that "the question of the meaning of a contract . . . is not what the framers of section 1292(b) had in mind"). Finally, with respect to question (7) concerning judicial estoppel, a district court should not certify an order for interlocutory appeal unless it believes that the order presents a question "as to which there is a substantial ground for difference of opinion." 28 U.S.C. § 1292(b). To satisfy this requirement, it is not enough that there be a difference of opinion, there must be a substantial ground for such difference. As indicated in my discussion of the issue, I conclude that there is not a substantial ground for difference of opinion on this issue and will accordingly decline certification.

IV. CONCLUSION

For the foregoing reasons,

IT IS ORDERED that Eaton's Motion to Reconsider is GRANTED as indicated above.

IT IS FURTHER ORDERED that Eaton's Motion for Interlocutory Appeal is DENIED.

Dated at Milwaukee, Wisconsin this 24 day of May, 2006.

/s/ LYNN ADELMAN
LYNN ADELMAN
District Judge

interpretation was right. Unfortunately, I did not detect my mistake until after the parties expended substantial resources on a jury trial. Eaton is understandably upset about having to incur the expense of a trial even though I should have granted summary judgment. However, Eaton wrongly blames HK for the unnecessary litigation. HK's underlying legal theory was reasonable, and it was entitled to pursue that theory aggressively. Its legal theory was reasonable because it had a strong argument that Eaton-Kenway's misrepresentation spawned the IBP litigation. Indeed, it is quite likely that the IBP suit would not have happened but for Eaton-Kenway's conduct. The hard part of this case was defining the notion of "causation" in the context of the reciprocal indemnification provisions in the asset purchase agreement. As explained in my earlier opinions and by the court of appeals, conduct by both Eaton-Kenway and HK could have been deemed "a cause" of HK's losses, and the text of the indemnification provisions was broad enough to require each side to indemnify the other for the same loss. Only after the jury trial did I realize that my original interpretation was wrong and come to understand that the concept of "intervening and superceding cause"—or, as the court of appeals put it, "responsibility", *HK Systems, Inc.*, 553 F.3d at 1090—needed to be applied to resolve the case. Applying this concept to the facts was by no means simple, and HK had reasonable arguments in favor of its position that Eaton should be held "responsible" for the loss. In any event, the important point is that my initial mistake was in no way caused by any misrepresentation or improper advocacy by HK. It was the result of

misinterpreting an extremely complicated body of law containing no clear guidance on the unique circumstances before the court.

Accordingly, I find that HK's counsel did not pursue his legal theories recklessly or with indifference to whether they had merit. His arguments certainly had merit, even though they did not prevail in the end. *Mustafa*, 442 F.3d at 550 (putting forth a reasonable legal theory

* * *

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 07-3596

HK SYSTEMS, INC,
Plaintiff-Appellant,

v.

EATON CORPORATION,
Defendant-Appellee.

March 3, 2009

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 02 C 1103
Lynn Adelman, Judge.

Before
Hon. Richard A. Posner, *Circuit Judge*,
Hon. Kenneth F. Ripple, *Circuit Judge*,
Hon. Terence T. Evans, *Circuit Judge*

ORDER

On February 18, 2009, plaintiff-appellant filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*.* The petition is therefore DENIED.

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* Circuit Judge Joel M. Flaum did not participate in the consideration of this matter.

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

[Filed 10/12/2007]

Case Number: 02-C-1103

HK SYSTEMS, INC.,
Plaintiff

v.

EATON CORPORATION,
Defendant

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment is granted in favor of defendant Eaton Corporation and this case is dismissed.

October 12, 2007
Date

JON W. SANFILIPPO
Clerk

/s/
(By) Deputy Clerk

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 02C1103

HK SYSTEMS, INC.,
Plaintiff,

v.

EATON CORPORATION,
Defendant.

VERDICT FORM

1. Did any portion of the financial loss that HK Systems incurred as a result of the lawsuit filed against it by Iowa Beef Packers (IBP) result from:

   (a) Any act of Eaton-Kenway or Eaton Corporation relating to or arising out of the period on or before February 13, 1995?

   Yes (Yes or No)

   (b) Any omission of Eaton-Kenway or Eaton Corporation relating to or arising out of the period on or before February 13, 1995?

   Yes (Yes or No)

   (c) Any occurrence of a matter with respect to the IBP Dakota City Project relating to or arising out of the period on or before February 13, 1995?

   Yes (Yes or No)

2. If you answered "yes" to any subpart of the above question, please indicate the dollar amount of the loss that resulted from the act(s) or omission(s) of Eaton-Kenway or Eaton Corporation, or from the occurrence of a matter with respect to the IBP Dakota City Project, relating to or arising out of the period on or before February 13, 1995. (If you answered all of the subparts of the above question "no," you do not need to answer this question.)

$ 3,128,148.39

/s/ Patricia Seduffo
PATRICIA SEDUFFO
Foreman

orders, such as motions for summary judgment, and re-open any part of a case before entry of final judgment. HK cites no case law in support of the purported constraints which it suggests apply to the district court's discretion. Instead, it cites wholly inapposite case law referencing limitations that arise only in the context of Rule 50. Yet, as the district court did not address the substance of Eaton's Rule 50 motion, holding it moot, any reference to Rule 50 is irrelevant. Thus, this Court should affirm the district court's judgment.

ARGUMENT

I. Standard of review.

The district court disposed of this case by granting Eaton's Motion for Summary Judgment. It did not enter judgment on the verdict of the jury or Eaton's Motion for Judgment as a Matter of Law ("Rule 50 motion"). Nevertheless, HK wants the Court to apply the Rule 50 standard of review[4] notwithstanding that such a standard is clearly irrelevant to these proceedings.[5]

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[4] During its briefing to the lower court, HK did not assert that when the district court reconsidered Eaton's Motion for Summary Judgment it was required to look at the trial evidence in the light most favorable to HK. Because HK failed to argue for this standard of review at the district court level, this Court should not consider it now. *See Blickenstaff v. R.R. Donnelley & Sons Co.*, 378 F.3d 669, 677 n.5 (7th Cir. 2004) (noting that plaintiff waived her right to argue for a *de novo* standard of review because plaintiff failed to "press for" such a standard in the various motions and responses she filed with the court).

[5] *Learning Curve Toys, Inc. v. Play Wood Toys, Inc.*, 342 F.3d 714, 721 (7th Cir. 2003) does not support the creation of the

Without citation to any supporting case law, HK suggests that this Court review the district court's order granting summary judgment as if it were reviewing an order granting judgment as a matter of law. While the standard of review under Rules 50 and 56 of the Federal Rules of Civil Procedure are similar, they are not the same. The standard for Rule 50 motions focuses on situations where "a party has been fully heard on an issue at trial and the defeated party questions whether there was 'legally sufficient' evidence for the jury to rule in the other's favor." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149, 120 S. Ct. 2097, 2109 (2000). In contrast, the summary judgment standard addresses whether the plaintiff produced sufficient evidence to demonstrate that a genuine issue of fact exists for the jury to decide. *Morgan v. Harris Trust & Sav. Bank of Chicago*, 867 F.2d 1023, 1027 (7th Cir. 1989).

The standard rule governing the review of summary judgment orders therefore applies. Under this standard, all questions of law are reviewed *de novo*. *Erie Ins. Group v. Sear Corp.*, 102 F.3d 889, 891 (7th Cir. 1996). Because this case revolves around the district court's interpretation of a contract, however, if the contract is found to be ambiguous, a more defe-

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hybrid standard HK advocates. The court in *Learning Curve* was not asked to review an order granting summary judgment. Rather, after the jury returned a verdict in favor of PlayWood, the court refused to enter judgment and granted Learning Curve's *Rule 50* motion, finding that PlayWood presented insufficient evidence of a trade secret. *Id.* On appeal, this Court reversed the lower court's decision regarding the adequacy of the evidence. As *Learning Curve* contains no discussion of the standard employed for motions for summary judgment or motions for reconsideration, it appears to have no bearing on the issues presented in this appeal.

rential standard of review is applied to the interpretation of the terms and factual findings. *Platinum Tech., Inc. v. Fed. Ins. Co.*, 282 F.3d 927, 931 (7th Cir. 2002). The district court's factual conclusions on mixed questions of law and fact are reviewed under the deferential standard of clear error. *Id.* "A finding is clearly erroneous when although there is evidence to support it, the reviewing court [looking at] the entire evidence is left with the definite and firm conviction that a mistake has been committed . . . " *Id.* Application of these standards demonstrates the district court properly granted Eaton's request for summary judgment.

II. The district court denied Eaton's Rule 50 motion as moot, and therefore, the merits of the motion cannot serve as the basis of this appeal.

The district court did not address the substance of Eaton's Rule 50 motion, instead finding that its grant of summary judgment rendered the motion moot. As such, any challenge to the substance of the motion or the adequacy of the evidence is not properly before this Court. *See Adrian Energy Assoc. v. Michigan Pub. Svc. Comm'n*, 481 F.3d 414, 420 (6th Cir. 2006) (noting that reviewing courts will not reach issues not ruled upon by the district court).

HK argues, without legal support, that this court should review the judgment below as though the trial court had granted Eaton's motion pursuant to Rule 50. Under Federal Rule of Appellate Procedure 28(a)(9), appellants are required to set forth the issues raised on appeal and to present an argument in support of those issues in their opening brief. *Pearce v. Sullivan*, 871 F.2d 61, 64 (7th Cir. 1989).

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